Supreme Court, U.S.
FILED
SEP 18 1992
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No. 92-527

In The

Supreme Court of the United States

October Term, 1992

Boerboom International, Inc. and
Jack Farrell Implement Co.,

Petitioners,

v.

American Computer Trust Leasing; ADP;
Automatic Data Processing Dealers Services,
Inc.; Automatic Data Processing, Inc.;
International Harvester Co., also known as
Navistar International Corporation;
J. I. Case Co., a wholly owned subsidiary
of Tenneco; John Doe; Richard Roe,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether taking a secret kickback from a vendor is still mail/wire fraud (18 USC 1341 and 1343 which is a basis for RICO, 18 USC 1962) or is now an "ordinary business transaction" (Appeals Court opinion at A-90).

II. Whether Respondents committed fraud (or fraud by concealment) in

(1) failing to reveal (or denying -- by Navistar) said secret kickbacks.

(2) declaring that the dealer's (Petitioner's) system could not be entered except by dealer's authorization, when ADP could and did enter the system to lock up the dealer's records, without the dealer's authorization.

(3) endorsing (by IH and Case) ADP to Petitioners, over other vendors on merit, after purported "extensive research", when in fact IH did not even know if the system worked preendorsement (Appeals Court opinion at A-94, see A-100; see also A- 98 to A-109).

III. Whether the actions of ADP/ACTL and IH/Navistar and Case/Tenneco constitute conspiracy.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The parties to this litigation, from the beginning, are Boerboom International, Inc. and Jack Farrell Implement Co., defendants, third party plaintiffs, and petitioners. American Computer Trust Leasing, plaintiff-respondent is understood to be a subsidiary of Automatic Data Processing, Inc. and ADP and Automatic Data Processing Dealers Services, Inc., third party defendants-respondents, all of whom are parties. Sanwa Business Credit Corporation is not a party but is associated with American Computer Trust Leasing.

International Harvester Co., a/k/a Navistar International Corporation, third party defendant-respondent, is a party to the litigation. Navistar International Transportation Corp., a nonparty, is a wholly owned subsidiary of Navistar International Corporation.

J. I. Case Co. is a wholly owned subsidiary of Tenneco, Inc., and both are third party defendants-respondents, parties to the litigation.

There are no other parties or affiliates to this litigation known to petitioners.

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No. _____

In The

Supreme Court of the United States

October Term, 1992

American Computer Trust Leasing,

v. *Respondents,*

Boerboom International, Inc.,

v. *Petitioner,*

ADP; Automatic Data Processing Dealers Services, Inc.; Automatic Data Processing, Inc.; International Harvester Co, also known as Navistar International Corporation; J. I. Case Co., a wholly owned subsidiary of Tenneco; John Doe; Richard Roe,

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Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 967 F. 2nd 1208 (8th Cir. 1992) and is printed in Appendix (hereafter A) at A-85. The judgment of the United States District Court for the District of Minnesota is reported at 763 F. Supp. 1473 and is printed at A-10.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 23, 1992. A timely petition for rehearing was denied on July 31, 1992. (A-97) This Petition has been filed within 90 days of said date. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves 18 USC 1341 (mail fraud) and 18 USC 1343 (wire fraud) which appellants contend invoke 18 USC 1962 (RICO), as further defined in 18 USC 1961 (RICO). These statutes are reprinted at A-1 through A-7.

STATEMENT OF THE CASE

This case was commenced in Lyon County District Court, State of Minnesota, and removed by third party

defendants to United States District Court, wherein the separate Boerboom and Farrell cases were consolidated and then Summary Judgment on a third party complaint was granted against Boerboom/Farrell on the issues presented herein.

Boerboom and Farrell were long time farm implement dealers for IH until 1985 when CASE purchased the IH agricultural equipment operation. In 1983 IH determined that a new computer system would be implemented, wherein IH would obtain its own computer, and the dealers would obtain their own computers, and the two would communicate. IH purported to conduct an investigation in search of a computer company it could endorse to its dealers, and on May 16, 1983, by contract with ADP and in announcement to dealers, endorsed ADP exclusively, supposedly on merit. (A-98 to A-100). Appendix to Court of Appeals (hereafter ACA) 754-758, 772-776, 822, 828-830, 898, 1169-1174. Eighth Circuit Opinion (hereafter Cir. Op.) at A-94 to A-95. The relationship between manufacturers (IH and Case) and dealer (Boerboom/Farrell) is such that manufacturer's "suggestions", to say nothing of endorsements, are not taken lightly. ACA1169. IH, and later CASE, advance approved all ADP ads. ACA767-768. Boerboom and Farrell bought the ADP system and it turned out to be absolute junk. ACA776-785, 846, 1173-1174. Significant numbers of other dealers also had such problems with ADP. Cir. Op. at A-88. Neither Boerboom nor Farrell had any such problems before or after the ADP system. ACA771-772. IH and later CASE continued to endorse the ADP system to these dealers while knowing but not revealing these shortcomings. (A-102 to A-109) ACA763-766, 846, 920,

1173-1174, 1201, 1216, 1232-1233. In discovery, three IH/ADP officials cannot recall if IH even tested ADP prior to the May 16, 1983 exclusive merit endorsement and the one official believes the system was tested but cannot recall if the IH team recommending the ADP contract for execution saw the testing result prior to recommendation. In discovery, IH is unable to state how it came to choose ADP. ACA757-758. In fact, IH agreed, by contract, to exclusively endorse the ADP system, to its dealers, which it did, without even knowing if the system worked. ACA920. Cir. Op. footnote 4 at A-94. However, the contract in which IH agreed to exclusively endorse ADP provided for the payment of a certain amount of money for each ADP system that IH convinced its dealers to take, with the projected payments, to IH and later CASE, to run about $7 million each. ACA758, 1167-1168. These payments were not revealed to the dealers, Cir. Op. footnote 2 at A-90; neither these dealers nor any other dealers (out of thousands) were told of these payments prior to purchase, ACA752-753; IH and CASE admit that none of their dealers knew of these payments prior to purchase, ACA757-758; and IH outright *denied* any such payments to the Boerboom/Farrell fellow dealer representative, Grant Hustad, (ACA969-970) and to Steve Boerboom himself (ACA756). Boerboom and Farrell contend that because they thought the IH, and later CASE, endorsement was "independent" and on merit alone, it influenced them to purchase ADP. They claim that if they had known IH and later CASE were profiting from the endorsement, they would not have ended up with ADP, for certain stated reasons. ACA771-772, ACA1172-1174. IH and later CASE contend that the "payments" were to

reimburse them for expenses, but neither at any time made any attempt to quantify these "expenses". A758, 1167-1168. Finally, in purchasing the system, ADP told Boerboom and Farrell that no one could enter the computer system without the dealers authorization, but ADP could and did enter the systems for at will "deactivation purposes" and did "deactivate" the systems when Boerboom and Farrell discontinued their payments, and the Boerboom and Farrell financial and inventory records were thus locked up and lost to Boerboom and Farrell, all to Boerboom/Farrell's surprise and objection. Cir. Op. at A-93 to A-94.

An Appeal was taken to the United States Court of Appeals for the Eighth Circuit pursuant to Federal Rule of Civil Procedure 54 (b) (the District Court on August 13, 1991 certified its judgment as final, A-69 to A-80, so that appeal could be taken) and 28 USC 1291. On June 23, 1992, the Eighth Circuit after oral argument affirmed said decision, and on July 31, 1992 the Eighth Circuit denied Petitioner's suggestion for rehearing en banc and petition for rehearing.

REASONS FOR GRANTING THE WRIT

Petitioners contend that the Eighth Circuit has rendered a decision in conflict with the decision of other United States Courts of Appeal on this matter.

It is respectfully submitted that this case, to this point, has proven the wisdom of that old adage, "Don't rob the train, steal the railroad." Secret kickbacks have almost always, in the various Circuits, been found a violation of 18 USC 1341 and 18 USC 1343, mail and wire

fraud, respectively. At this point, we have the Sixth Circuit, *U.S. vs. Bibby*, 752 F. 2nd 1116 (Sixth Circuit 1985), cert. den. 106 S. Ct. 1183, 89 L. Ed. 2nd 300; *U.S. vs. Kerkman*, 866 F. 2d 877 (Sixth Circuit, 1989) and the Seventh Circuit, *U.S. vs. Bryza*, 522 F. 2nd 414 (Seventh Circuit, 1975), cert. den. 96 S. Ct. 2237, 426 U.S. 912, 48 L. Ed. 2nd 837, telling us that taking a secret kickback constitutes mail fraud and wire fraud, and we now have the Eighth Circuit declaring that taking a secret kickback constitutes an "ordinary business transaction". (see Cir. Op. at A-90).

Petitioners respectfully contend that when Edgar Gillock (*U.S. v. Bibby*, supra) or Ted Bryza (*U.S. v. Bryza*, supra) secretly sell their influence on an isolated basis, we have no trouble seeing that this is the classic long condemned secret kickback. But, have certain recent large scale shortcomings so calloused our fundamental sense of right and wrong that when microwrong becomes macrowrong, we label it "ordinary business transaction" and move on? If wrong becomes institutionalized, is it then right?

Edgar Gillock (*U.S. vs. Bibby*, supra) was a former Tennessee State Senator who agreed to take secret payments for using such influence as he had with Shelby County officials so as to influence them to purchase a Honeywell Computer. Mr. Gillock went to prison. He was determined by the Court to have violated the mail fraud/wire fraud (18 USC 1341/18 USC 1343) statutes, wherein it has long been the rule that if you take a secret payment for influencing another this is fraud, and it is the severe type of fraud that is even a crime. The IH corporate policy under which Ted Bryza went to prison (yes, there

is irony – the imprisoned Ted Bryza was an IH employee who did unto IH that which IH now does unto its dealers with differing consequences) forbids this activity. (ACA762, 1162, 1167). All IH (and later CASE) had to do to avoid this situation was to make one mailing, or require ADP to insert one line in its contract with the dealers that these payments were being made. The fact that this was not done, and the fact that IH denied it on at least two separate occasions, we respectfully contend, is at the very least, the requisite fraud. The law is and must be that if you must take vendor payments keyed to sales, for a "merit" endorsement, at least you must disclose the arrangement to those to whom you endorse and seek to influence. Buyers do not give the same credence to an endorsement they know to be bought and paid for, as they do to a supposedly impartial, personal, "nothing to gain" merit endorsement from a hithertofore trusted source. IH, and later CASE, had every opportunity to disclose. And, the fact that the system was merit endorsed without being tested and the fact that deficiencies later found were not revealed (and the 7 million reasons each therefore) demonstrate exactly why secret kickbacks have been and must continue to be unlawful. We respectfully contend that this fraud on the part of IH, even to the point of IH denying the kickbacks, was rationalized away.

Let's say, for example, that the Minnesota State Court Judges are allowed to purchase, with their own personal funds, desktop computer systems so as to communicate with the Court Administrator's Office. The Court Administrator volunteers to both investigate competing systems and endorse by mail and wire. He exclusively endorses

A, on merit, but actually without even knowing if A even works. A is purchased and turns out to be junk. We later learn that Mr. Court Administrator was secretly paid, by A, X dollars for every A sold, supposedly to reimburse some expenses that Mr. Court Administrator now can't seem to quantify. Secret kickbacks? Or, ordinary business transaction? It is impossible, on the basis of any coherent legal principle, to distinguish what respondents have done from what any garden variety Gillock or Bryza has done, unless their relative stations in life are the distinguishing principle, thus converting the "secret kickback" to the "ordinary business transaction".

The other fraud, which relates to the first, is the IH claim that "extensive research" was done before endorsing ADP. The Appeals Court dismisses this by declaring that IH "could not have known whether the ADP system worked when it entered into the contract with ADP because the ADP system had not yet been developed". Yet, this is the very point. The initial contract with ADP on May 16, 1983 was not an agreement to work toward endorsement, but it was *the* agreement wherein ADP was exclusively endorsed on merit, and this "merit" endorsement was thus communicated to the dealers. At this point IH didn't even know if the ADP system worked (A-100), but they did know that from this moment forward IH would secretly get $ X for each ADP system it could convince a dealer to take. The IH exclusive "merit" endorsement started at that moment, and it never discontinued, even long after IH and later CASE knew the system was junk. A-100 to A-109. Wrapping it all together, we contend, is the apparent fact that $14 million (the projected secret payments) was a lot more important

to IH, and later CASE, than whether or not its endorsement was earned or valid, as represented.

Petitioners respectfully contend that the fundamental flaw in the Eighth Circuit decision is a failure to recognize that the ADP/ACTL – IH/Navistar – Case/Tenneco cabal is fully as capable of violating 18 USC 1341 or 1343 as Ted Bryza or Edgar Gillock. This is exactly the wrong point in time to allow this breach in the dam to go unplugged. It will not take the next Ted Bryza and Edgar Gillock very long to find this case and determine that, after all, he too was then thus just engaged in an "ordinary business transaction".

CONCLUSION

Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Dated: September 17, 1992

Respectfully submitted,

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APPENDIX

18 USCS § 1341

Fraud and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. (As amended Aug. 9, 1989, P. L. 101-73, Title IX, Subtitle F, § 961(i), 103 Stat. 500; Nov. 29, 1990, P. L. 101-647, Title XXV, Subtitle A, § 2504(h), 104 Stat. 4861.)

18 USCS § 1343

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(As amended Aug. 9, 1989, P. L. 101-73, Title IX, Subtitle F, § 961(j), 103 Stat. 500; Nov. 29, 1990, P.L. 101-647, Title XXV, Subtitle A, § 2504(i), 104 Stat. 4861.)

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative [relating] to

fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable

under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in

violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is a least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of

the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P. L. 95-598,

18 USCS § 1962 CRIMES

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their

accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat. 4398.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1988. Act. Nov. 18, 1988, in subsec. (d), substituted "subsection" for "subsections".

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

American Computer Trust Leasing,

Plaintiff,

v.

Jack Farrell Implement Co., et al.,

Defendants.

Civil No. 4-89-199

ORDER

American Computer Trust Leasing,

Plaintiff,

v.

Boerboom International, Inc., et al.,

Defendants.

Civil No. 4-89-261

Craig D. Diviney, Esq., J. Thomas Vitt, Esq., Margaret M. Zverinova, Esq. and Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, MN 55402, counsel for Plaintiff and Automatic Data Processing, Inc.

James R. Anderson, Esq., P.O. Box 1196, Marshall, MN 56258, counsel for defendants Boerboom and Farrell.

John Q. McShane, Esq., Mary E. Bolcom, Esq., Lezlie Ott Marek, Esq. and Bowman and Brooke, 600 Midwest Plaza West, 801 Nicollet Mall, Minneapolis, MN 55402, counsel for Navistar International Transportation Corp.

Bradley G. Clary, Esq. and Oppenheimer, Wolff & Donnelly, First Bank Building, Suite 1700, St. Paul, MN 55101 and Robert A. DuPuy, Esq., John F. Hovel, Esq. and Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202, counsel for J.I. Case Company.

This matter is before the court on the following motions:

1. Plaintiff American Computer Trust Leasing and counterclaim defendant Automatic Data Processing, Inc.'s motion for summary judgment;

2. Counterclaim defendant Navistar International Corporation's motion for summary judgment;

3. Counterclaim defendant J.I. Case Co.'s motion for summary judgment; and

4. Defendants Jack Farrell Implement Co. and Boerboom International's motion to stay entry of any judgment against them.

Based on a file, record and proceedings herein, the motions for summary judgment are granted and defendants' motion to stay entry of judgment is denied.

BACKGROUND

Plaintiff American Computer Trust Leasing ("ACTL") brought suit against defendants Boerboom International, Inc. ("Boerboom") and Jack Farrell Implement Co. ("Farrell") (collectively referred to as the defendants) to collect payments for computer hardware leased from ACTL. Boerboom and Farrell each claim that their obligation should be excused because the hardware did not work

properly. The defendants also bring various counterclaims against plaintiff ACTL and counterclaim defendants Automatic Data Processing, Inc. ("ADP"), Navistar International Transportation Corporation (formerly International Harvester) ("IH") and J.I. Case Company ("Case"). The counterclaims may be divided into three main groups. First, the defendants bring computer system claims alleging that they were defrauded in connection with their acquisition of ADP computer systems. They further allege that the computer systems performed poorly and assert claims for breach of contract and breach of express and implied warranties. The breach of contract and breach of express and implied warranty claims are found in Counts I and II of the counterclaims while the fraud claim appears primarily in Count III. Second, the defendants bring various conspiracy claims. Boerboom and Farrell allege that IH, Case and ADP conspired to force the defendants to purchase ADP computer systems. The defendants assert claims based on civil conspiracy (Count III), violation of state and federal antitrust laws (Count IV) and violations of the Racketeering Influenced and Corrupt Organization Act (Count IV). Finally, the defendants bring software deactivation claims alleging that their computer software was wrongfully deactivated, relying on various statutes. (Counts VI through XI). ADP brings separate claims against Farrell and Boerboom to collect payments due pursuant to their leases for computer services.

Farrell and Boerboom are presently Case agricultural equipment dealers and were IH dealers before the January 1985 sale of IH's farm equipment business to Case. Before 1983, IH furnished computer services directly to

all of its farm implement dealers in exchange for a monthly fee. IH decided to outsource the dealer computer services because of the severe financial strain it experienced during the early 1980s as a result of the downturn in the U.S. farm economy.[1] IH made the decision in 1982 to stop providing such services to its dealers and began to look for an outside vendor to provide those services. IH discussed its plan with eleven system vendors. One of those companies was ADP. IH communicated to the potential vendors that if selected as a vendor a company would be required to develop a system of hardware and software capable of communication with IH's mainframe. IH also wanted vendors to develop software that would provide dealers with capabilities in the area of parts ordering, inventory tracking, accounting, customer record keeping, warranty records and whole goods ordering.

IH decided to endorse only one vendor, ADP, and ADP and IH entered into a contract on May 16, 1983. The contract required ADP to develop a communications software package called the Dealer Communications Systems ("DCS") which would enable IH and its dealers to communicate with each other through a dealers communications network ("DCN") and also permit dealers to communicate amongst themselves. ADP agreed to develop and provide suitable hardware for both on-line and on-site dealer computer needs. IH further required ADP to modify its existing dealer software products to specifically meet the needs of IH dealers. ADP also

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[1] During 1982 alone, IH lost over $800,000,000.

agreed to participate in a steering committee which monitored the transition to the ADP system.

IH endorsed only ADP for a number of reasons. ADP was a large stable company and one of the pioneers in the computer services industry.[2] Second, ADP agreed to tailor its computer products to meet the needs of IH and its dealers. Third, IH believed that endorsing only one vendor would facilitate a smoother transition to a new system for both IH and its dealers. Fourth, IH's strained financial condition mandated a quick termination of its computer services business and a single endorsement would help streamline that process.

Both the contracts between IH and ADP and between IH and its dealers expressly provide that vendors other than ADP could provide computer services to the dealers. Vendors who wanted to provide the DCN component of the computer services to IH dealers were required to submit to a testing process to ensure that the vendor met DCN specifications. The specifications were made available to vendors early in the conversion process and numerous other vendors developed DCN capability and competed with ADP for sales. Only the DCN component required such certification. Dealers could use any parts managements or accounting system without reference to compatibility with the IH communications center.

IH had a considerable investment in its computerized dealer communication network. It also incurred considerable expense in outsourcing the dealer computer services.

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[2] In the early 1980s ADP was an industry leader in providing computer services to automotive dealerships.

It sought to recoup some of this expense in its contract with ADP. During negotiations IH initially sought a lump sum payment of $1,000,000 as consideration for its investment. ADP was reluctant to make such a payment because of IH's uncertain future and insisted on paying a royalty for each dealer sale as a method of defraying IH's costs and investment.[3] ADP therefore contracted to pay IH a royalty for each system sold in amounts varying from $500 to $4,250, with an average royalty of $1,700.[4]

Defendant Boerboom had served as an IH dealer since at least 1980. Boerboom agreed to purchase an ADP system on October 9, 1984. Stephen Boerboom, the general manager and vice president of Boerboom, considered the purchase of another type of computer system before choosing ADP. Boerboom also testified that before the purchase he knew that IH allowed other computer vendors to certify that they met DCN specifications. Boerboom attended an ADP-IH sponsored roll-out meeting on October 9, 1984.[5] Although Boerboom at that time was

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[3] ADP had a similar royalty arrangement with another agricultural equipment manufacturer, Allis-Chalmers.

[4] Royalties like those included in the ADP-IH agreement are a common method of payment in the computer industry. Normally such royalties are used when the value of a business contract cannot be closely estimated at the time when the contract begins. The effect of such royalties is to protect both parties and to help ensure that the eventual total payment reasonably corresponds with the ultimate value of the contract.

[5] Such meetings were conducted to give the dealers the opportunity to learn about IH's computer requirements and learn about the manner in which the dealers would be able to communicate with IH through ADP systems.

considering the purchase of a different computer system, the roll-out meeting and Boerboom's own investigation caused him to conclude that the ADP system was the equivalent of the other system it was considering. Shortly thereafter, on November 6, 1984, Boerboom entered into an equipment lease for an ADP Series 2000 Model 2020 computer system. IH received a $500 royalty payment as a result of Boerboom's purchase. Case received nothing.

Defendant Farrell had been an IH dealer since 1962. Farrell also attended the roll-out meeting sponsored by IH and ADP on October 9, 1984. On January 31, 1985, IH sold its agricultural equipment business to Case. Following a brief transition period which ended in late spring of 1985, IH had no further involvement with its former agricultural dealers, including Boerboom and Farrell, regarding any matters, including those relating to communication and computer services. On May 9, 1985, approximately three months after becoming a Case dealer, Farrell signed an ADP software license agreement and an ADP equipment purchase agreement. In August 1985, the purchase agreement was modified when Farrell signed an agreement to lease rather than buy the equipment. In that contract, Farrell leased a Series 2000 Model 2015 computer system. Steve Farrell, primary operating officer of Farrell, testified that Farrell looked at four or five vendors, narrowed its choice to either ADP or Farm Equipment Association and eventually chose an ADP system. Neither IH nor Case received a royalty payment as a result of this transaction.

The relationship between the defendants, and ADP and ACTL is governed by three contracts: the purchase and maintenance agreement and the software license

agreement with ADP, and the equipment lease agreement with ACTL. Under the purchase and maintenance agreement and the software license agreement, Boerboom and Farrell each agreed to purchase computer hardware from ADP, to pay ADP a monthly fee for maintenance and support of the computer hardware and to license several software applications from ADP. Both Boerboom and Farrell decided to exercise their options to lease their computer hardware from ACTL. Their decision to lease the computer hardware canceled that part of the purchase and maintenance agreements concerning the direct sale of the computer hardware but left the remaining provisions of the agreements in force. Boerboom and Farrell both entered into an equipment lease agreement with ACTL which provided for a seven-year term of monthly lease payments to ACTL. Neither IH nor Case is a party to the contracts between the defendants and ADP and ACTL.

After acquiring the IH assets, Case extended offers to both Farrell and Boerboom to become agricultural equipment dealers for Case. Farrell and Boerboom accepted their respective offers. Farrell and Case entered into an agricultural equipment dealer agreement effective March 12, 1985. Boerboom and Case entered into a similar contract effective February 20, 1985. Both Farrell and Boerboom continue today as Case dealers.

On January 7, 1985, shortly after Case announced that it (and its parent company Tenneco) would be purchasing certain assets of IH's agricultural equipment operations, Case notified all of its North American dealers that it had signed letters of intent to endorse two computer system suppliers, ADP and Dealer Information Systems. On January 7, 1985, before Farrell had signed

any contracts with ADP, Case sent its dealers a letter stating that its endorsement meant that it judged that both the ADP and DIS systems would be effective for its equipment dealers use. The letter further stated that the endorsed suppliers were judged to be experienced and proven performers in the dealer system market and that the suppliers were obligated by contract with Case to meet Case's communications requirements. The letter also noted that Case required all of its dealers obtain some type of communication system by the end of 1986.[6] In approximately March 1985, Case announced that it approved three additional manufacturers, RIMSS, Dubuque Data Systems and NFPEGA, as vendors for dealer computer systems.

On May 6, 1985, Case and ADP entered into a contract concerning the development and implementation of a communications bridge between Case's host processing computer and the ADP dealer communication system that had been developed for the IH dealers. The agreement provided that the ADP computer system would be available to Case dealers in regional system selection meetings between May 6, 1985 and December 31, 1986. That agreement specifically noted that DIS, the other manufacturer endorsed by Case, would also be present at

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[6] Although Case began requiring its agricultural dealers to become part of the computerized dealer communication network after it purchased the agricultural division of IH in 1985, this was never an IH requirement. Boerboom nonetheless leased and installed an ADP system while it was still an IH dealer. Farrell leased and installed an ADP computer system approximately three months after it became a Case dealer but over eighteen months before Case's deadline.

those roll-out meetings as a Case-endorsed vendor.[7] The Case-ADP contract further provided royalties for ADP systems purchased by Case dealers. Case, however, would not earn royalties for computer installations where the royalty had been paid or was due to be paid to IH pursuant to the ADP-IH agreement.[8]

Boerboom and Farrell defaulted on their obligations to ACTL under the equipment lease agreements and ACTL seeks judgment against them. The defendants bring a myriad of claims against ACTL, ADP, IH and Case. The defendants also move to stay entry of any judgment against them. ACTL, IH and Case seek summary judgment on all of defendants' counterclaims. ADP also moves for summary judgment on all of defendants' counterclaims except for their breach of express warranty claims.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered

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[7] Steve Farrell acknowledged that his dealership did not attend any roll-out meetings sponsored by Case and also declined various invitations by Case to obtain more information about the computer systems offered by the various vendors.

[8] Pursuant to its ADP contract, Case to date has received royalty payments of $508.20. ADP paid that royalty as a result of the sale of an ADP computer system to one Case dealer, neither Farrell nor Boerboom.

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Stated in the negative, summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); Fed. R. Civ. P. 56(c). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. *Id.* at 250. The nonmoving party, however, may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. *Id.* at 322-23. With this standard at hand, the court will consider all of the motions.

I. ACTL's Motion for Summary Judgment on Its Claims Against Defendants

Plaintiff ACTL seeks summary judgment on its claims against Boerboom and Farrell. Those claims are governed by the contracts between the parties: Boerboom's November 6, 1984 equipment lease agreement and Farrell's August 19, 1985 equipment lease agreement. The central provision of the agreements provides that:

> This agreement provides for a net lease and the rent and other amounts due hereunder from Lessee to Lessor shall not be subject to any defense, claim, reduction, set-off or adjustment for any reason whatsoever.

This section is a "hell or high water" clause common to equipment leasing agreements. *See, e.g., In re OPM Leasing Servs., Inc.*, 21 Bankr. 993 (S.D.N.Y. 1982). This clause obligates Boerboom and Farrell to make the payments required by the equipment lease agreements regardless of any defenses that they may raise. Boerboom and Farrell do not attack the validity of the equipment lease agreements and thus Boerboom and Farrell must pay ACTL the amounts owed pursuant to the lease agreements.[9] The court in *In re OPM Leasing Services* stated:

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[9] ACTL and the defendants agree that Illinois law applies to the agreements. The hell or high water clause of the agreements is valid and enforceable under Illinois law. *See, e.g., Dillman & Assocs., Inc. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335, 442 N.E.2d 311 (1982)(holding that lessee was liable for all rent due under the terms of a lease with a hell or high water clause regardless of lessee's claim that the leased equipment was defective); *Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance*, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977).

> [c]ourts have uniformly given force and effect to "hell and high water" clauses in the face of various kinds of defaults by the party seeking to enforce them (citations omitted). The courts . . . held that clauses containing unconditional promises are strictly enforceable as a matter of law. In doing so, they have found summary judgment in favor of the lessor or its assignee because no facts submitted or to be submitted by the lessee opposing summary judgment are in any way relevant to the lessee's unequivocal liability based on these hell and high water provisions.

21 Bankr. at 1006-07.[10]

Under the terms of the equipment lease agreements, Boerboom and Farrell are liable to ACTL. Both have defaulted on the equipment lease agreements. The agreements give ACTL the right to repossess and sell the equipment and to recover damages.[11]

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[10] Other jurisdictions uniformly enforce lease agreements with hell or high water clauses. *See, e.g., Philadelphia Sav. Fund Soc'y v. Deseret Management Corp.*, 632 F. Supp. 129 (E.D. Pa. 1985); *St. Paul Leasing Co. v. Winkel's, Inc.*, 309 Minn. 583, 244 N.W.2d 661 (1976).

[11] The defendants contend that the computer equipment did not work properly and thus they are not liable under the terms of the equipment lease. Given ACTL's limited role in the acquisition of the ADP computer system, Boerboom and Farrell must look only to ADP, the supplier of the computer systems, for any claims that the equipment did not work properly. Those claims must be made under the warranty provisions of

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Boerboom and Farrell raise two defenses to ACTL's damages calculation: (1) they contend that they did not receive a stipulated loss value sheet; and (2) they argue that ACTL delayed in reselling the computer equipment, thus reducing the value that ACTL received on resale. Defendants' assertion that they did not receive the stipulated loss value sheet is irrelevant because it provides no defense to their liability for the breach of contract. ACTL concedes that defendants' second argument, that ACTL failed to mitigate its damages, raises a material fact issue and seeks judgment calculated by using the figure that defendants claim represents the fair market value of the computers at the time of ACTL's repossession.[12] Based on

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the purchase and maintenance agreements between ADP and the defendants. *See* U.C.C. § 2A-103 which states:

> [d]ue to the limited function usually performed by the [finance] lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties.

Although this portion of the Uniform Commercial Code was not in effect in Illinois at the time the parties entered into their respective lease agreements, the hell or high water clause of the equipment lease agreements reflects the realities of ACTL's role in the lease transaction. ACTL spent its funds to purchase the particular computer hardware selected by Boerboom and Farrell selected and ACTL furnished that hardware to them. In return, Boerboom and Farrell unconditionally obligated themselves to pay ACTL a stream of lease payments.

[12] ACTL originally sought a judgment against Boerboom for $26,895.42 and against Farrell for $38,040.46. The

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the foregoing, ACTL's motion for summary judgment against Boerboom and Farrell is granted in the amounts of $20,855.42 against Boerboom and $33,020.46 against Farrell.

II. ACTL's Motion for Summary Judgment on Defendants' Counterclaims

ACTL is named as party in Counts III through XI of the defendants' counterclaims. Each of the counterclaims will be examined in turn to determine if summary judgment is appropriate. The counterclaims may be divided into three main areas. First there are computer system claims in which the defendants allege that they were defrauded in their acquisition of ADP computer systems. The fraud claim appears to be centered in Count III of the counterclaims. They also allege that the computer systems performed poorly and assert claims for breach of contract and breach of express and implied warranties, found in Counts I and II of the counterclaims. Second, the defendants bring various conspiracy claims. Boerboom and Farrell allege that IH, Case, ACTL and ADP conspired to force them to purchase ADP computer systems.

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defendants, however, claim that ACTL did not mitigate its damages because it failed to promptly dispose of the repossessed equipment. ACTL, conceding that this claim raises a material fact issue, is willing to stipulate for purposes of this summary judgment motion to the fair market value of the computer systems at the date of the defaults, which defendants claim is $18,000. The amounts now requested reflect ACTL's substitution of the $18,000 for the amounts that ACT actually received when it resold the computer systems.

Boerboom and Farrell assert claims based on civil conspiracy (Count III), violation of state and federal antitrust law (Count IV) and violation of the Racketeering Influenced and Corrupt Organizations Act (Count V). Finally, Boerboom and Farrell bring software deactivation claims asserting that their computer software was wrongfully deactivated and bringing claims based on various statutes (Counts VI through XI). ACTL now seeks summary judgment on all of Boerboom and Farrell's counterclaims.

A. Defendants' Fraud Claims

A fraud claim must involve a false statement of a past or present material fact. *Dollar Travel Agency, Inc. v. Northwest Airlines*, 354 N.W.2d 880 (Minn. Ct. App. 1984). Boerboom and Farrell proffer no evidence that ACTL made any false statements to them, and thus ACTL is entitled to summary judgment on their fraud claims.

B. Conspiracy and Software Deactivation Claims

The defendants main allegation concerning ACTL is that ACTL is owned primarily by ADP and thus ACTL must be involved in the fraud, conspiracy and software deactivation allegations they make against ADP, IH and Case. However, the defendants do not offer any evidence that ACTL made any fraudulent statements to them, deactivated their software or otherwise had anything to do with those allegations. ACTL offers evidence to rebut defendants' allegations concerning its involvement. James Sproule, Director of Credit and Operations for

ADP, testified that ACTL's only involvement with Boerboom and Farrell involved the financing of their acquisition of ADP computer systems and administering their lease agreements. Boerboom and Farrell offer no evidence to dispute this and thus summary judgment is granted in favor of ACTL on all of defendants' counterclaims.[13]

III. ADP's Motion for Summary Judgment on Defendants' Claims

ADP also seeks summary judgment on all of defendants' counterclaims except for the breach of express warranty claims.

A. ADP's Motion for Summary Judgment on Defendants' Fraud Claims

Defendants rest their counterclaims for fraud on two separate bases. First, the defendants claim that it was fraudulent for ADP, IH and Case to fail to disclose the arrangement for royalty payments. Defendants' second allegation of fraud arises from statements by ADP, Case and IH which allegedly induced the defendants to purchase computer systems which defendants contend failed to function as promised.

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[13] Boerboom offers another defense to its liability: that ACTL terminated its lease on February 15, 1988 and thus is not entitled to lease payments after that date. The equipment lease agreement, however, expressly gives ACTL the right to terminate the lease on Boerboom's default and recover all the damages due pursuant to the lease terms.

To prevail on a claim of fraud, a party must prove that it relied on a false representation (or a failure to disclose a material fact which the other party had a duty to disclose) and the party was damaged as a result of the reliance. *Veit v. Anderson*, 428 N.W.2d 429, 433 (Minn. Ct. App. 1988). The representation must be false and made with knowledge of its falsity, or held out as true although made without knowledge of its truth or falsity. *Id.* Moreover, the party making the representation must intend that the other party rely on it, the statement must be material and must concern a past or present fact rather than a promise of future performance. *Id.*

Boerboom and Farrell first claim that ADP is guilty of fraud because it failed to disclose the existence of royalty payments to its clients. Nondisclosure, however, does not constitute fraud unless one party is "under a legal or equitable obligation to communicate to the other." *Daher v. G.D. Searle & Co.*, 695 F. Supp. 436, 440 (D. Minn. 1988) (quoting *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365, 244 N.W.2d 648, 650 (1976)). The obligation to disclose arises in two situations: (1) where one party owes a fiduciary duty to the other, *see Minnesota Timber Producers Ass'n, Inc. v. American Mutual Ins. Co.*, 766 F.2d 1261, 1267-68 (8th Cir. 1985); or (2) where the circumstances are such that failure to disclose renders misleading statements which have already been made. *Estate of Jones v. Kyamme*, 430 N.W.2d 188, 193 (Minn. Ct. App. 1988) (citations omitted), *rev'd in part on other grounds*, 449 N.W.2d 428 (Minn. 1989). Neither situation applies to the relationship between ADP and Boerboom and Farrell. ADP is not a fiduciary of the dealers because ADP, Boerboom and Farrell are business entities who bargained at

arm's length in a commercial setting. *See, e.g., Minnesota Timber Producers*, 766 F.2d at 1268 (finding that no fiduciary relationship existed between two parties who merely contracted at arm's length); *W.K.T. Distrib. Co. v. Sharp Elec. Corp.*, 746 F.2d 1333, 1336-37 (8th Cir. 1984) (applying Minnesota law to hold that an ordinary supplier-distributor relationship does not lead to a confidential relationship); *Groseth Int'l. Inc. v. Tenneco. Inc.*, 410 N.W.2d 159, 168-69 (S.D. 1987) (upholding summary judgment that no fiduciary relationship existed between International Harvester and one of its dealers). ADP owes no fiduciary duty to the defendants. The defendants also proffer no evidence to demonstrate that ADP's alleged failure to disclose the royalty arrangements rendered misleading other statements which had already been made. Thus, ADP had no duty to disclose the royalty arrangement it reached with either IH or Case.

Defendants also assert a fraud claim based on the alleged concealment of material information concerning the royalty arrangements. Both Boerboom and Farrell testified that they were unaware of the royalty payment arrangement between ADP and IH and ADP and Case. The defendants present no other evidence to support their claim that the royalty payment arrangements were intentionally concealed. ADP, however, proffers evidence that it did disclose the royalty payments through the testimony of Gordon Gibbs, a nonparty fact witness. Gibbs attended a national IH dealer council meeting in February 1984, well before either Boerboom or Farrell leased from ADP. During that meeting, attended by various dealers and representatives of ADP and IH, the

royalty payments were discussed. Gibbs testified specifically that ADP and/or IH disclosed to all members of the dealer council that ADP would make a royalty payment in the average amount of $2,000 directly to IH for each ADP system sold to an IH dealer. Gibbs further testified that he told other dealers about the royalty payments and that any dealer could have learned about what was discussed at the dealer council meeting by calling the dealer representative. Thus, defendants' allegations of fraudulent concealment are unsupported by the facts and ADP's motion for summary judgment on this claim is granted.

Defendants further claim that ADP made a myriad of allegedly fraudulent statements. In order for such representations to be actionable, they must be false statements of a past or present fact. *Iten Leasing Co. v. Burroughs Corp.*, 684 F.2d 573, 575 (8th Cir. 1982) (applying Minnesota law). A wide variety of statements ordinarily used in sales negotiations are not actionable as fraud. These include ordinary sales puffing, *Hollerman v. F.H. Peavey & Co.*, 269 Minn. 221, 228-29, 130 N.W.2d 534, 540 (1964), statements of opinion, *Mutsch v. Rigi*, 430 N.W.2d 201, 204 (Minn. Ct. App. 1988) (citation omitted), and promises of future performance, *Iten Leasing Co.*, 684 F.2d at 575. Moreover, any representation or expectation of future acts is not sufficient to support a fraud claim merely because the represented act or event does not occur. *RJM Sales & Mktg. v. Banfi Prods, Corp.*, 546 F. Supp. 1368, 1377 (D. Minn. 1982) (applying Minnesota law).

Defendants seek to impose liability on the basis of these types of statements, including:

> "ADP is a proven dealer in data processing"
>
> [T]his Harvester/Case/ADP relationship will give us (Harvester/Case) leadership."
>
> "The Harvester/Case/ADP relationship will ensure support."
>
> "No other system compares to ADP."
>
> "ADP is capable of dramatically increasing the efficiency and profitability within our dealership."

None of the alleged misrepresentations is actionable because each statement is either true, constitutes ordinary sales talk or puffing, or is a representation of future acts.[14] Defendants also list a number of statements of opinion as a basis for fraud. For example, the defendants offer a statement that "the competing Challenger system does not have a chance of surviving." Statements of opinion are also not actionable. *Mutsch*, 430 N.W.2d at 204. Because Boerboom and Farrell proffered no evidence of any actionable statements, summary judgment is granted in favor of ADP on the defendants' fraudulent misrepresentation counterclaims.

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[14] Even if ADP were wrong regarding some of the capabilities of its systems, this type of mistake is not actionable because "[a] good faith, non-negligent mistake is not the basis of liability for misrepresentation in this state." *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). Moreover, defendants make no claim that ADP did not intend to perform at the time when such statements were allegedly made. Absent that intention, ADP is not liable for any statements about future expected benefits which did not occur. *Kramer v. Burns*, 396 N.W.2d 627, 631 (Minn. Ct. App. 1986) (holding that an indication of an intent to act in the future is not actionable).

B. ADP's Motion for Summary Judgment on Defendants' Claims of Breach of Contract and Breach of Warranty

1. ADP's Motion for Summary Judgment on the Breach of Implied Warranty Claims

The purchase and maintenance agreements govern Boerboom and Farrell's claims for breach of warranty and contract. Article 10 of both agreements defines ADP's warranties as:

> A. ADP represents and warrants to Client that, except as provided in paragraph 3 above, the Equipment shall be free and clear of all liens, claims, encumbrances and security interests whatsoever and that the Equipment shall be free from defects and material and workmanship at the Installation Date thereof.
>
> B. EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Under Minnesota law an exclusion of an implied warranty of merchantability is effective if it mentions merchantability and if in writing, the writing must also be conspicuous. Minn. Stat. § 336.2-316. An exclusion of the implied warranty of fitness is effective if it is in writing and is conspicuous. The Minnesota Commercial Code defines the term "conspicuous" as follows:

> "Conspicuous:" A term or clause is conspicuous when it is so written that a reasonable person

> against whom it is to operate ought to have noticed it. A printed [sic] heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. . . . Whether a term or clause is "conspicuous" or not is for decision by the court.

Minn. Stat. § 336.1-201(10); *see Dubbe v. A.O. Smith Harvestore Prods., Inc.*, 399 N.W.2d 644 (Minn. Ct. App. 1987) (holding that claims for breach of implied warranty are particularly well suited for summary judgment because the court determines whether or not an exclusion of warranties is conspicuous).

The signature lines for the client in the purchase and maintenance agreements are in the lower right-hand corner on the front page of the agreements. Immediately above the place where Boerboom and Farrell signed is the following statement printed in bold:

> THIS AGREEMENT IS SUBJECT TO ADDITIONAL TERMS AND CONDITIONS ON THE REVERSE SIDE WHICH CLIENT ACKNOWLEDGES HAVE BEEN READ AND ARE PART OF THIS AGREEMENT.

This exclusion term itself is printed in all capital letters while the surrounding terms are almost entirely in regular type. The language directed Boerboom and Farrell to examine the back of the contract where the exclusion provision is printed in contrasting type. Both Boerboom and Farrell admit that they had the opportunity to read the contract. Moreover, Boerboom and Farrell do not contest ADP's arguments concerning the exclusion of

implied warranties. Based on the foregoing, the exclusion is conspicuous as a matter of law and ADP's motion for summary judgment on the implied warranty claims is granted.[15]

2. ADP's Motion for Partial Summary Judgment on the Measure of Damages for Defendants' Breach of Express Warranty and Breach of Contract Claims

The Minnesota Commercial Code provides for the recovery using two measures of damages for breach of warranty: direct damages and consequential damages. Minn. Stat. § 336.2-714. Direct damages are defined as "the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted." *Id; see also Kleven v. Geigy Agric. Chems.*, 303 Minn. 320, 323, 227 N.W.2d 566, 569 (1975). The Minnesota Supreme Court has defined consequential damages as:

> Those that 'do not arise directly according to the usual course of things from the breach of the contract itself, but are rather those which are the consequence of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made.'

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[15] Boerboom and Farrell argue that ADP's contract might not be effective because the person who signed the contracts for ADP, Mr. Suberlak, might not have been an authorized officer of ADP. However, defendants proffer no evidence to support this argument.

Id. at 324, 227 N.W.2d at 569 (citation omitted); *see also Minn.* Stat. § 336.2-715.

The purchase and maintenance agreements limit Boerboom and Farrell to direct damages for their breach of warranty claims. Article 11 of the Agreements provides:

> B. IN NO EVENT WILL ADP BE RESPONSIBLE FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES WHICH CLIENT MAY INCUR OR EXPERIENCE ON ACCOUNT OF ENTERING INTO OR RELYING ON THIS AGREEMENT, EVEN IF AN ADP HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Under Minnesota law the exclusion of consequential damages is valid unless such exclusion is unconscionable. Minn. Stat. § 336.2719(3). The question of unconscionability is for the court. *See* Minn. Stat. § 336.2-302, U.C.C. Comment 3. In the present case, the exclusion allocates the risk of consequential damages in advance in a commercial setting and operates against two experienced businesses.[16] Under these circumstances the exclusion of consequential damages is not unconscionable and thus valid as a matter of law. *See, e.g., Kleven*, 303 Minn. at 329, 227 N.W.2d at 572. Therefore, ADP's motion for partial summary judgment limiting Boerboom and Farrell

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[16] Boerboom has been a farm implement dealer for 10 years and had gross sales of almost $5,000,000 in 1988. Farrell has been a farm implement dealer since 1962 and had almost $3,000,000 of sales in 1988.

to the recovery of direct damages on their breach of express warranty claims is granted.[17]

C. ADP's Motion for Summary Judgment on Defendants' Conspiracy Claims

1. ADP's Motion for Summary Judgment on Defendants' Civil Conspiracy Claims

Conspiracy is defined as a combination of persons to accomplish either an unlawful purpose or a lawful purpose by unlawful means. *Harding v. Ohio Casualty Ins. Co.*, 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950) (citation omitted). To prove a civil conspiracy claim, a wrongful act must be done to the injured party. The mere existence of a combination of persons acting in concert is insufficient to establish civil conspiracy. *Id.* If there is no underlying wrong there can be no civil conspiracy. *Id.* A civil conspiracy claim thus is merely a means for asserting vicarious or joint and several liability. *Id.* at 338, 41 N.W.2d at 825.

The defendants' civil conspiracy claim is found in Count III of the counterclaims. They assert the following as the wrongful acts committed by the conspiracy: (1)

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[17] The purchase and maintenance agreements also contain a provision limiting Boerboom's and Farrell's remedy to the repair and replacement of defective items of equipment. If enforceable, this provision would eliminate any claims for money damages for breach of express warranty. ADP concedes that at this point in the litigation there is a fact question concerning whether or not that provision failed of its essential purpose. *See* Minn. Stat. § 336.2-719(2); *Jacobs v. Rosemount Dodge*, 310 N.W.2d 71 (Minn. 1981). Therefore, this issue need not be addressed at this time.

IH's endorsement of ADP; (2) fraud in the computer sales; (3) the defective nature of the computers; (4) the alleged deactivation of software and misappropriation of information; (5) witness tampering with Gordon Gibbs; and (6) threats made to Farrell by a collection agency. The vast majority of these allegations concern only ADP and do not implicate the other parties in the case. Thus, even if all of the claims were valid, the defendants' allegations fail to support their claims of civil conspiracy because they provide no evidence that any other party agreed with ADP or conspired with ADP to commit the alleged wrongful acts.[18] Defendants also seem to allege that IH, Case and ADP all made misrepresentations to them concerning the defendants' leasing of the ADP computer systems. They also offer no evidence of any conspiracy regarding the misrepresentations and thus these allegations constitute ordinary fraud claims at most.

Finally, the defendants allege as a basis for civil conspiracy violations of Minn. Stat. §§ 609.55, 609.88 and 609.89, which concern the wrongful taking of property, computer theft and computer damage. These claims also fail because Boerboom and Farrell proffer no evidence that their systems were damaged or that any information was taken. In addition, they provide no evidence that if such acts occurred, that ADP acted intentionally or with an intent to injure, as required for such violations.

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[18] Moreover, ADP hotly disputes the defendants' underlying fraud, breach of warranty and software deactivation claims. ADP also considers defendants' allegations of witness tampering to be unfounded. It further denies that it authorized, knew of or took part in any threats made to Farrell by a collection agency.

Based on the foregoing, ADP's motion for summary judgment on the defendants' civil conspiracy claims is granted.

2. ADP's Motion for Summary Judgment on the Antitrust Conspiracy Claims

The defendants accuse ADP, IH and Case of conspiracy and restraint of trade in violation of Minn. Stat. § 325D.51 and § 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, they claim that ADP, IH and Case conspired to force them to buy ADP computer systems. They contend that their status as farm implement dealers would have been jeopardized if they had refused to buy ADP systems. The defendants essentially allege that this conspiracy is a tying arrangement in violation of the state and federal antitrust laws.[19]

Courts define a tying relationship as the sale of one item (the tying product) on the condition that the buyer must also purchase a second item (the tied product) from the same source. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1140 (8th Cir. 1981). The elements of an illegal tying arrangement are: (1) separate and distinct tying and tied products; (2) the seller will only sell the tying product on the condition

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[19] The defendants' counterclaim also mentions refusal to deal, price fixing, production control and allocation of markets as bases for the antitrust claims. However, the defendants have never offered any facts to support those claims and thus summary judgment is granted in favor of ACTL, ADP, IH and Case on any claims premised on those legal bases.

that the buyer purchases the tied product; (3) the seller has market power in the market for the tying product; (4) the tying arrangements has foreclosed a substantial volume of commerce in the market for the tied product; (5) the seller has an economic interest in the market for the tied product; (6) the seller's activities affected interstate commerce; and (7) plaintiff was injured in its business or property because of the tying arrangement. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

The essence of a tying claim is the seller's use of its control over the. tying product market to force the buyer to purchase the tied product. The United States Supreme Court stated:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish Hosp., 446 U.S. at 12.

Boerboom and Farrell's only evidence of the alleged coercion is included in their affidavits which state that ADP was endorsed by IH and later by Case, and that Case told them they must have in-house computer systems capable of communicating with Case. Steve Boerboom admitted that he was never told that a refusal to purchase an ADP system would affect his status as an IH dealer; rather he testified that he merely assumed that

fact but could not provide any basis for his assumption. Boerboom also knew that IH allowed other computer vendors to test for compatibility with its system. Moreover, he also testified that he considered the purchase of another type of computer system before choosing ADP. Farrell also concedes that his company could have purchased either an ADP system, a DIS system or a system manufactured by any of the three other vendors recommended by Case. Thus, the defendants proffer no evidence to support their claims that they were forced to purchase ADP systems to remain either IH or a Case dealers and ADP is entitled to summary judgment on the federal antitrust claim.[20]

Minnesota courts consistently follow federal law in interpreting the Minnesota antitrust statutes. *State v. Duluth Bd. of Trade*, 107 Minn. 506, 517, 121 N.W. 395, 399

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[20] IH never required that its dealers purchase computer systems. When Case purchased the agricultural division of IH in 1985 Case began requiring its agricultural dealers to become part of its computerized dealer communication network. Case required its dealers to purchase computer systems prior to year-end 1986. Farrell decided to lease on ADP computer system eighteen months before this deadline. Boerboom actually acquired its ADP system before Case purchased the assets of IH.

The actual sales of ADP equipment also undercuts defendants' contention that they were forced to purchase ADP systems. Between the initial offering of the ADP system to dealers and the sale of the agricultural division to Case, only 74 IH dealers agreed to purchase the ADP system. After Case purchased IH's farm equipment business, an additional 174 dealers purchased the ADP system. Thus, only 250 dealers out of approximately 1,110 dealers eventually purchased the ADP system.

(1909); *Keating v. Phillip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987) (citations omitted). Thus, the foregoing analysis applies to the defendants' state antitrust claims and summary judgment is granted to ADP on the state antitrust tying claim.[21]

3. ADP's Motion for Summary Judgment on Defendants' RICO Conspiracy Claims

Boerboom and Farrell allege in Count V of their counterclaims that ADP violated three sections of RICO, 18 U.S.C. §§ 1962(a), (c) & (d).[22] The elements of a RICO claim are: (1) conduct (2) of an enterprise engaged in or affecting interstate commerce (3) through a pattern (4) of racketeering activity (5) that causes injury to the business or property of the plaintiff. 18 U.S.C. §§ 1962, 1964(c); *see Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

To prove a civil RICO claim, a party must prove acts of racketeering activity as defined by § 1961(1). Section

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[21] Moreover, Boerboom's antitrust claim is barred by the statute of limitations. The appropriate statute of limitations for both federal and state antitrust claims is four years. 15 U.S.C. § 15(b); Minn. Stat. § 325D.64. Boerboom entered into its agreement to purchase an ADP computer system on October 9, 1984 and did not begin its antitrust action until February 3, 1989, more than four years after the accrual of any antitrust cause of action.

[22] Section 1962(a) makes it unlawful for a person who has received income derived from a pattern of racketeering activity to invest any of that income in an enterprise. Section 1962(c) makes it unlawful to conduct the affairs of an enterprise through a pattern of racketeering activity. Section 1962(d) makes it unlawful to conspire to violate §§ 1962(a) or (c).

1961(1) defines racketeering activity as certain specifically enumerated state felonies and violations of specific sections of the United States Criminal Code. 18 U.S.C. § 1961(1). Boerboom and Farrell allege the following acts of racketeering activity: (1) mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) in connection with representations allegedly made to Boerboom and Farrell about their computer systems; (2) IH's contract with ADP and specifically ADP's payment of royalties to IH; and (3) the alleged deactivation of software which Boerboom and Farrell claim violates Minn. Stat. §§ 609.27, 609.275 and 18 U.S.C. §§ 875, 1951.[23]

To prove a mail fraud claim, defendants must prove a scheme to defraud, use of mails in furtherance of that scheme and a specific intent to defraud. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399-1400 (9th Cir. 1986) (citations omitted). The elements of wire fraud substitute interstate use of wire communications for use of the mails but are otherwise identical. *McNally v. United States*, 483 U.S. 350 (1987). As discussed above, Boerboom and Farrell present no evidence of actionable

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[23] Boerboom and Farrell originally alleged racketeering activity based on the failure of the computer systems to work properly and also witness tampering with Gordon Gibbs in violation of 18 U.S.C. § 201. They subsequently abandoned those claims. Moreover, Gibbs himself testified that no witness tampering took place. During his deposition he was asked "did anybody from ADP ever attempt to threaten or coerce you in any way with respect to any testimony you've been asked to give? Answer: No." Thus, there is also no evidence before the court to support the defendants' witness tampering claim.

fraud and thus allegations of racketeering activity based on wire or mail fraud fail.

Case and IH's endorsements of ADP and ADP's payment of royalties to them are not racketeering activities as defined by Section 1961(1). Thus, this allegation also does not support defendants' RICO claim.

The software deactivation claims similarly do not support RICO claims.[24] Examining Boerboom's deactivation claims, the defendants do not contest ADP's assertion that Boerboom's computer system was never deactivated. Boerboom, after deciding to buy a computer system from a competitor of ADP, sent ADP a letter terminating its agreement effective August 31, 1987. Upon receiving this cancellation notification, ADP agreed to stop billing Boerboom for hardware maintenance, software licenses and software support. Despite Boerboom's cancellation notification, Boerboom subsequently alleged that its computer system was shut off wrongfully because ADP failed to provide it with a conversion tape to help transfer its information from ADP's computer system to another computer vendor's computer system. ADP admits that it did not provide a conversion tape but it

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[24] The defendants also base a RICO claim on 18 U.S.C. § 641. Section 641 deals with embezzling, stealing, purloining or knowingly converting property of the United States. If the property involved in a dispute does not belong to the United States then no violation of § 641 is possible. *See United States v. Yokum*, 417 F.2d 253, 255 (4th Cir. 1969) (citation omitted). The defendants' claims do not involve any property of the United States, and thus IH's, ADP's and Case's motion for summary judgment on the § 641 claim is granted.

had no obligation to do so because it never contracted to provide such tapes to help its former clients transfer information to new computer systems.

It is undisputed that ADP did deactivate Farrell's software.[25] The deactivation occurred, however, as a result of Farrell's nonpayment under the terms of the software license agreement. Both Boerboom and Farrell signed agreements providing that the licenses granted by ADP for software could be canceled upon the client's default. Moreover, the software license agreements expressly provided that ADP retain full ownership of the software used by Boerboom and Farrell. Both Boerboom and Farrell stopped paying the software license fees due under the software license agreements. Steven Farrell testified that Farrell was aware of the fact that software services would be discontinued if payments were not made. After Farrell's account had fallen significantly past due, ADP notified Farrell on June 30, 1987 that it would terminate all processing and support services on July 8, 1987 if payment was not received by that date. On July 8, 1987, ADP deactivated Farrell's software as previously warned. After Farrell discovered that its software had been shut off for nonpayment, Farrell paid the amounts past due on its account and ADP promptly reactivated the software.[26] At that point, ADP contends that Farrell

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[25] Farrell further complains that ADP did not provide a conversion tape, but as discussed above, ADP had no contractual obligation to provide Farrell with such a tape.

[26] Farrell disputes this, contending that its computer system was never reactivated. Because ADP had a legal right to deactivate the equipment this fact dispute is irrelevant for purposes of the summary judgment motion.

disconnected its modem so that ADP could no longer access the system for service and support. Farrell made no further payments to ADP although ADP contends that Farrell continued to use ADP software and hardware.

The software deactivation claims do not support a RICO violation because the federal and state extortion statutes cited by the defendants do not apply to those claims based on the foregoing facts. The defendants assert that the software deactivation constitutes "extortion" in violation of Minn. Stat. §§ 609.27, 609.275 and 18 U.S.C. §§ 875, 1951. Violation of 18 U.S.C. § 875 is not a racketeering activity listed under § 1961(1) and thus cannot support the RICO claims. As discussed above, ADP suspended the defendants' use of its software because Boerboom requested deactivation when it changed to another type of computer system and because Farrell stopped paying ADP the license fees due under its software license agreement. ADP had a legal right to deactivate the defendants' software pursuant to the contracts and the extortion statutes do not apply. The federal statute defines extortion as the "obtaining of property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The Minnesota statute similarly requires "unlawful" activities. Minn. Stat. § 609.27. Because ADP's deactivation was not unlawful or wrongful but merely an exercise of its rights under the software license agreement, its deactivation does not violate either extortion statute and thus is not a racketeering activity.

Based on the foregoing analysis, all of defendants' racketeering allegations fail because none of them are

premised on the requisite racketeering activity as defined by 18 U.S.C. § 1961(1) and ADP's motion for summary judgment on the RICO claims is granted.

D. ADP's Motion for Summary Judgment on the Software Deactivation Claims

The defendants also bring a variety of claims in addition to the RICO claim on the basis of the alleged deactivation. Because Boerboom's software was never deactivated, *see* discussion above, ADP's motion for summary judgment on Boerboom's deactivation claims is granted.[27]

ADP also had a legal right to deactivate Farrell's software for nonpayment. Moreover, ADP was under no obligation to provide the defendants with a conversion tape and any claims based on ADP's failure to provide such a tape are unfounded.

In Count VI Farrell seeks treble damages pursuant to Minn. Stat. § 332.51 for ADP's alleged violations of Minn. Stat. §§ 609.52, 609.88 and 609.89. Civil recovery for violation of those statutes was not available until 1988 when Minnesota enacted § 332.51, the statute on which defendants seek to rely. Although § 332.51 does provide for civil liability for violations of those statutes, it was not

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[27] Boerboom did not dispute ADP's assertion that its computer system was not deactivated.

approved until April 12, 1988, after the alleged deactivation occurred and has no bearing on this litigation.[28]

In Count VIII, Farrell seeks damages pursuant to Minn. Stat. § 548.05 for trespass, claiming trespass occurred when ADP wrongfully entered Farrell's computer system and also appropriated and destroyed Farrell's accounting and inventory records. The Minnesota statute provides for damages for trespass as follows:

> Whoever shall carry away, use or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable to the owner thereof for treble the amount of damages assessed therefor in the action to recover such damages.

Minn. Stat. § 548.05. Minnesota courts hold that property must be "produced by and grown upon land" to come within the terms of this statute. *Mondt v. Sexter Realty Co.*, 293 N.W.2d 376, 377 (Minn. 1980). The *Mondt* court further held that home furnishings, toys and clothing do not constitute such personal property. *Id.* Moreover, the term "or other personal property" has been confined to property similar to property previously enumerated in the statute, limiting trespass to things which are the product of the soil. *Berg v. Baldwin*, 31 Minn. 541, 542-43, 18 N.W. 821, 822 (1884). The alleged deactivation is not the taking

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[28] There is no indication that Minn. Stat. § 332.51 is to be applied retroactively. Acts of the legislature are not retroactive unless expressly declared so by the legislature or unless it appears that retroactivity was clearly and manifestly intended by the legislature. *Hunt v. Nevada State Bank*, 285 Minn. 77, 92, 172 N.W.2d 292, 302 (1969) (relying on Minn. Stat. § 645.21). Neither is true with respect to this statute.

of the type of property governed by this statute and thus ADP's motion for summary judgment on that claim is granted.

In Count IX, Farrell claims that ADP/ACTL and/or Harvester/Case made "wrongful entry into Farrell's property and by use of direct force appropriated and destroyed its accounting and/or inventory and/or accounting records." Farrell contends that those actions obstructed its free use of its property and thus constitutes statutory nuisance in violation of Minn. Stat. § 561.01. The Minnesota nuisance statute provides that:

> Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance.

Minn. Stat. § 561.01. Private nuisance has been defined as:

> an interference with the use and enjoyment of land. The ownership or rightful possession of land necessarily involves the right not only to unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation.

W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 87, at 619 (5th ed. 1984). There can be no nuisance if a party cannot show an injury stemming from an interest in land. The alleged deactivation, even if it occurred as defendants contend, is not the type of injury which courts have found to violate the nuisance statute because the use of a computer system is

not the type of property protected by the statute.[29] Based on the foregoing, ADP's motion for summary judgment on the statutory nuisance claim is granted.

E. ADP's Motion for Summary Judgment on Defendants' Claim that it Misappropriated their Wire Communications

Boerboom and Farrell also seek recovery from ADP and the other third-party defendants on the theory that ADP and/or IH wrongfully gained access to defendants' computer systems and misappropriated their property. In Count X, Farrell alleges a violation of 18 U.S.C. § 2511, which outlaws the interception and disclosure of wire or oral communications. This statute bars activities such as wiretapping and eavesdropping through the use of electronic surveillance. It does not outlaw the authorized use of computer data and thus has no applicability to the present case because both defendants allowed ADP access to their computer systems pursuant to their contracts with ADP.[30] Steven Farrell and Stephen Boerboom

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[29] Defendants rely on an Iowa case which does not support this claim. In *Page County Appliance Center, Inc. v. Honeywell, Inc.*, the court found that a computer that generated sufficient radiation to disturb a neighbor's television reception constituted a nuisance. 347 N.W.2d 171, 175 (Iowa 1984). The court reasoned that the disturbance of television reception was an interference in the use of the neighbor's land. Defendants, however, are unable to tie their computer deactivation claims to any land and this case does not support their nuisance claim.

[30] By its terms, 18 U.S.C. § 2511(2)(c) states that "[i]t shall not be unlawful under this chapter for a person acting under

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both acknowledged that they were aware that ADP and/or IH could access to their computer systems. Because they allowed such access, they cannot claim that any alleged access was unlawful.[31] Moreover, even if the statute applied to the present case, defendants proffer no evidence that their wire communications were actually intercepted or disclosed. They merely allege that ADP somehow got into their computer systems and used this access to snoop for unspecified purposes. The only evidence to support this allegation is that the indicator lights on the computer systems would sometimes be illuminated.

The defendants also seek relief for an alleged violation of 18 U.S.C. §§ 2701-10. This statute, the Electronic Communications Privacy Act, bars unlawful access to stored communications. The statute, however, is not directed to the type of harm alleged by the defendants. As noted above, the defendants consented to ADP's access and cannot now claim that such access was unauthorized. *See* 18 U.S.C. § 2701(c) (prohibition against unlawful access does not apply to conduct authorized "by the person or entity providing a wire or electronic

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color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior to consent to such interception."

[31] In Count VII, defendants seek treble damages pursuant to Minn. Stat. § 626A.13 for the alleged violation of Minn. Stat. §§ 626A.01-.23. The defendants specifically allege a violation of Minn. Stat. § 626A.02 which mirrors 18 U.S.C. § 2511. The Minnesota statute also does not apply to any interception of communication if such access is authorized.

communication service"). Based on the foregoing, ADP's motion for summary judgment on defendants' claims concerning the misappropriation of their wire communication is granted.

IV. IH's Motion for Summary Judgment

IH also moves for summary judgment on all of the defendants' claims. Many of the facts and law offered in support of IH's motion parallel ADP's and ACTL's motions as discussed above. The claims will be reexamined briefly concerning only those facts or arguments that pertain solely to IH's motion.

A. IH's Motion for Summary Judgment on Defendants' Contract Claims

IH is named as a party in Count II of the counterclaims in which defendants contend that the alleged performance problems with the ADP system constitute a breach of contract. However, IH is not a party to the contracts between ADP and Boerboom and Farrell and there was no buyer-seller relationship between IH and the defendants which would give rise to any contractual liability. *See, e.g., Avery v. Solargizer Int'l. Inc.*, 427 N.W.2d 675, 684 (Minn. Ct. App. 1988) (holding that there can be no contractual liability where no contractual relationship exists). These claims are governed exclusively by the Uniform Commercial Code because any damages incurred as a result of the nonperformance of the ADP system are economic losses in a commercial setting. The Uniform Commercial Code permits recovery in such cases only where there is contractual privity. *See, e.g., Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990).

Accordingly, IH's motion for summary judgment on defendants' counterclaim in Count II is granted.[32]

B. IH's Motion for Summary Judgment on Defendants' Fraud Claims

The defendants allege the same facts to support their fraud claim against IH as they allege against ADP. The defendants first contend that IH fraudulently failed to disclose its royalty payments and that IH had a duty to disclose the payments because a fiduciary relationship existed between IH and the defendants as its dealers. As discussed above, no fiduciary relationship exists between IH and the defendants. *See. e.g., Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 168-69 (S.D. 1987) (holding that no fiduciary relationship existed between IH and one of its dealers). Moreover, there are no facts to support the defendants' claim that a fiduciary relationship existed or that the parties intended such a relationship. The facts demonstrate that the parties only dealt at arm's length. *See Minnesota Timber Producers v. American Mut. Ins. Co.*, 766 F.2d 1261, 1267-68 (8th Cir. 1985). The defendants' mere assertion that they trusted IH is sufficient to establish a fiduciary relationship. *Id.* at 1268 (applying Minnesota law). Thus, this contention will not support defendants' claim of fraud.[33]

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[32] Count I, which also alleges breach of warranty claims, is not brought against IH.

[33] IH contends that the undisputed evidence shows that the royalty payments were actually disclosed. IH relies on

(Continued on following page)

Defendants also allege that various statements were fraudulently made about the ADP systems. IH seeks summary judgment on all fraud claims relating to such statements.[34] As previously discussed, the defendants' claims for fraudulent misrepresentation fail because they either provide no evidence of falsity or the statements alleged concern future acts, opinion or ordinary sales puffing and thus are not actionable. IH also did not have a fiduciary relationship with the defendants, and thus it had no duty to disclose the royalty payments. Therefore, IH's motion for summary judgment on defendants' fraud claims is granted.

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Gordon Gibbs' testimony to support this disclosure. Gibbs testified that the royalties were discussed in detail with the dealers at the national IH dealer council meeting in February 1984, which was attended by a group of dealers elected to represent other dealers across the country. Those elected dealers met once a year and then reported the proceedings to the dealers that they represented.

[34] IH also argues that it is entitled to summary judgment because the defendants failed to plead fraud with the required particularity. Fed. R. Civ. P. 9(b). IH contends that the defendants failed to apprise it of the precise nature and content of the alleged fraudulent misrepresentations, who made the alleged misrepresentations and to whom were they made. In situations where fraud is alleged against more than one party each party "is entitled to know the particular allegations of fraud it allegedly committed. Common circumstances do not excuse a plaintiff from identifying which party allegedly perpetrated which specific acts of fraud." *Daher v. G.D. Searle & Co.*, 695 F. Supp. 436, 439-40 (D. Minn. 1988) (citations omitted). Because defendants plead no statements of actionable fraud, the court need not address the defendants' claimed failure to plead fraud properly.

C. IH's Motion for Summary Judgment on Defendants' Civil Conspiracy Claims

Because the defendants proffer no evidence to support their claims that IH conspired with either ADP or Case, or that IH committed any unlawful activity, IH's motion for summary judgment on the defendants' civil conspiracy claims in Count III of the counterclaims is granted.

D. IH's Motion for Summary Judgment on Defendants' Antitrust Claims

IH's motion for summary judgment on the defendants' antitrust claims is also granted. As previously discussed, the defendants present no evidence that IH forced them to purchase an ADP system. Boerboom and Farrell have both admitted that they knew they were free to purchase computer systems from vendors other than ADP. Although IH admits that it encouraged its dealers to use ADP, there was no requirement that defendants purchase an ADP system. Thus, defendants' antitrust tying claims under state and federal law fail.

E. IH's Motion for Summary Judgment on Defendants' RICO Claim

All of the defendants' racketeering allegations fail because none of them are premised on the requisite racketeering activity as defined by 18 U.S.C. § 1961(1). *See supra* RICO discussion. Thus, IH's motion for summary judgment on the RICO claims is granted.

F.IH's Motion for Summary Judgment on the Software Deactivation Claims

The defendants' various claims concerning deactivation are based on their contention that IH was somehow involved in the deactivation of their ADP systems. Such claims fail because defendants proffer no evidence that IH participated in the termination of their computer services. The terminations occurred after the sale of IH farm equipment business to Case in 1985 and IH had no computer contact with the defendants after the sale.[35]

The defendants also claim that IH violated Minn. Stat. § 609.52, which imposes criminal liability for theft, because IH acted with knowledge and consent or participation in the deactivation. As noted previously, however, no civil recovery is available under § 609.52 because the statute permitting civil recovery pursuant to § 609.52 was not effective until after the alleged deactivations occurred and the statute should not be applied retroactively.

Farrell also contends that when it stopped its lease payments, ADP, with the knowledge and consent or participation of IH, threatened Farrell in violation of 18 U.S.C. § 1951. Section 1951, however, provides no cause of action because ADP had a clear legal right to suspend Farrell's use of its software once Farrell discontinued payment. *See* Deactivation discussion *supra*. Moreover, § 1951 is purely criminal in nature and does not give rise to a cause of action for civil liability. *See, e.g., Peterson v.*

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[35] As noted previously, Boerboom's software was terminated at Boerboom's request and Farrell's software was not deactivated until July 8, 1987.

Philadelphia Stock Exch., 717 F. Supp. 332, 335-36 (E.D. Pa. 1989) (Concluding that § 1951 does not permit a private right of action); *Creech v. Federal Land Bank*, 647 F. Supp. 1097, 1099 (D. Colo. 1986) (Holding that "no implied private cause of action exists under 18 U.S.C. § 1951"). thus, the defendants' civil claim pursuant to § 1951 is without merit and IH's motion for summary judgment on this claim is granted.

The defendants further claim that ADP, with the knowledge and consent or participation of IH, willfully disclosed or attempted to disclose to other persons the contents of the defendants' wire communications and/or willfully used or endeavored to use the contents of those communications in violation of Minn. Stat. § 626A.02 and 18 U.S.C. § 2511. As previously noted, those statutes do not apply to the authorized use of computer data, and IH's motion for summary judgment on these claims is granted.

IH's motion for summary judgment on the defendants' trespass claim is also granted. Deactivation of a computer system is not the type of harm that Minn Stat. § 548.05 was designed to remedy because it precludes only trespass of property that is produced or grown on land. *See Mondt*, 293 N.W. at 377. Because the defendants allege no property within the scope of the statute, IH's motion for summary judgment on the trespass claim is granted.

IH's motion for summary judgment on the nuisance claim is also granted because Minn. Stat. § 561.01 specifically requires that the alleged nuisance be offensive "to the senses." The defendants present no evidence showing

that their software deactivation offended the senses. Moreover, as noted previously, the cases interpreting the nuisance statute do not stretch the definition of property to include the use of leased software. *See, e.g., Highview North Apts. v. Ramsey County*, 323 N.W. 2d 65 (Minn. 1982) (holding that ground water is a nuisance covered by the statute because it interfered with plaintiff's free use of its land. Thus, IH's motion for summary judgment on the nuisance claim is granted.

Based on the foregoing analysis, IH's motion for summary judgment on all of defendants' claims is granted.

V. Case's Motion for Summary Judgment on the Defendants' Claims

A. Case's Motion for Summary Judgment on Defendants' Fraud Claims

The defendants allege many of the same factual bases for their fraud claims against Case. First, they assert that Case engaged in fraudulent concealment because it had a fiduciary duty to disclose the royalty payment arrangement between Case and ADP and Case failed to do so. However, Case did not owe the defendants a fiduciary duty. *See, e.g., RMJ Sales & Mktg., Inc. v. Banfi Prods. Corp.*, 546 F. Supp. 1368, 1377-78 (D. Minn. 1982). Thus, Case was under no obligation to disclose the royalty provisions to the defendants and this assertion will not support a fraud claim.

Case is also entitled to summary judgment on the defendants' fraud claims based on alleged misrepresentations. Boerboom presents no evidence that Case made any representations, either true or false, to Boerboom. It is undisputed that Boerboom had already leased and installed its ADP computer system several months before it became a Case dealer. Moreover, Steve Boerboom testified that Boerboom had no evidence to prove any involvement by Case in the dealings between ADP and Boerboom prior to February 1985. Thus, Case is entitled to summary judgment on any misrepresentation claims by Boerboom.

In his deposition, Steven Farrell alleged only two misrepresentations which Farrell could attribute to Case: (1) that if Farrell leased an ADP system it would not have to pay for future enhancements during the life of a lease; and (2) that by endorsing the ADP system "Case told us this was a good system."

Examining the future enhancement claim, Steve Farrell conceded in his deposition that no one from Case had ever told him that Farrell would not have to pay for any future enhancements to Farrell's computer. Farrell recalled only that Mark Prokosh, an ADP employee, advised him that future communications would be guaranteed at no additional charge. Despite this concession, Steve Farrell believes that Case impliedly made such a representation, pointing to a letter of Case's dated February 7, 1985, which included a statement that the endorsed suppliers (ADP and DIS) were obligated by contract with Case to meet Case's communication requirements, including both current and future requirements. The letter, however, does not state that a dealer would not have to

pay for any future enhancements; the letter merely indicates that future enhancements would be required. Thus, Farrell proffers no evidence that Case made any misrepresentations about the cost of future enhancements and this allegation does not support a claim of fraud.

Farrell further claims that by endorsing ADP, Case misrepresented that the ADP system was a good one. Farrell again points to the letter dated January 7, 1985, in which Case stated that its endorsement of ADP and DIS meant that the systems were "judged" by Case "to be effective for equipment dealer use" and that ADP and DIS were "judged" by Case "to be experienced, proved performers in the dealer's system market." As discussed previously, however, statements are not actionable as fraud unless they are misrepresentations of a "past or present fact." *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 175 (8th Cir. 1971) (citation omitted). Statements of opinion and promises of future performance are not actionable. *Mutsch v. Rigi*, 430 N.W.2d 201, 204 (Minn. Ct. App. 1988) (Addressing statements of opinion); *Iten Leasing Co. v. Burroughs Corp.*, 684 F.2d 573, 575 (8th Cir. 1982) (Applying Minnesota law to promises of future performance). On the present facts, Case merely expressed its opinion that both ADP's and DIS's systems would be effective for equipment dealer use and that ADP and DIS were experienced in that market. At most, Case simply expressed a belief that ADP's system would perform properly in the future, and thus the proffered statements do not constitute actionable fraud.[36] Based on

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[36] Case also contends that the defendants failed to allege fraud with particularity, but this argument need not be addressed based on the foregoing analysis.

the foregoing, Case's motion for summary judgment on the defendants' claims of fraud is granted.

B. Case's Motion for Summary Judgment on the Breach of Contract Claims

In Count II, the defendants bring breach of contract claims against Case. However, the depositions of Boerboom and Farrell establish that Case has not breached any contract with the defendants. It is undisputed that Case is not a party to the contracts at issue. Stephen Boerboom's testimony indicates that he did not think that Case breached any kind of contractual arrangement with Boerboom. Steve Farrell also testified that he did not believe that Case was a party to any of the contracts at issue. Thus, Case's motion for summary judgment on the contract claims in Count II is granted.

C. Case's Motion for Summary Judgment on Defendants' Civil conspiracy Claims

In Count III the defendants contend that Case was part of a continuing criminal and civil conspiracy, the alleged goal of which was to force the defendants to purchase or lease ADP computers. Case, however, did not require the defendants to purchase ADP computer systems. Case initially endorsed two dealers (ADP and DIS) and it later approved computer systems offered by three additional manufacturers. It is undisputed that Boerboom purchased an ADP system before it became a Case dealer. Steve Farrell also testified that no one from Case ever told him that Farrell had to buy an ADP system. Moreover, as

noted above, the defendants failed to present evidence that Case combined with the other third-party defendants to accomplish either an unlawful purpose or a lawful purpose by unlawful means. *Harding v. Ohio Casualty Ins. Co.*, 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950) (citation omitted). Thus, Case is entitled to summary judgment on the defendants' civil conspiracy claim.

D. Case's Motion for Summary Judgment on Defendants' Antitrust Claims

The defendants's antitrust claims against Case also fail. Case did not require its dealers to purchase an ADP system because it is undisputed that Case, from the beginning, endorsed both ADP and DIS as vendors. Moreover, Case did not require its dealers to purchase computer systems until the end of 1986. Boerboom acquired its ADP system before Case purchased the agricultural equipment business from IH. Steve Farrell also admitted that he knew that his company could have purchased either an ADP system, a DIS system or a system manufactured by any of the other three vendors recommended by Case. Thus, the defendants proffer no evidence that Case forced them to purchase an ADP system and Case's motion for summary judgment on the antitrust claim is granted.

E. Case's Motion for Summary Judgment on the RICO Claims

As discussed above, defendants present no evidence of racketeering activity within the provisions of RICO.

Moreover, the defendants' argument in support of its RICO claim is principally grounded on their characterization of computer royalty payments as kickbacks. This argument is irrelevant as it apples to Case because it is undisputed that Case received no royalty payments from either Farrell's or Boerboom's lease of an ADP system. Thus, Case's motion for summary judgment on the defendants' RICO claims is granted.

F. Case's Motion for Summary Judgment on Defendants' Claims of Computer Theft or Damage

The defendants' claims pursuant to Minn. Stat. § 332.51 in Count VI fail because the statute was not enacted until after the alleged violations occurred and there is no reason to apply the statute retroactively. *See* Minn. Stat. § 645.21; *Hunt v. Nevada State Bank*, 285 Minn. 77, 92, 172 N.W.2d 292, 302 (1969). Thus, Case's motion for summary judgment on these claims is granted.

G. Case's Motion for Summary Judgment on Defendants' Claim of Misappropriation of their Wire Communications

The defendants contend in Count VII of their counterclaims that case violated Minn. Stat. § 626A.01 *et seq.* because of the alleged misappropriation of information contained in their ADP systems. The defendants, however, proffer no evidence that Case "snooped" in their systems, and thus Case's motion for summary judgment on this claim is granted.

H. Case's Motion for Summary Judgment on Defendants' Trespass Claim

Case is entitled to summary judgment on the trespass claim because, as previously noted, computerized data does not fall within the scope of Minn. Stat. § 548.05. Moreover, even if computerized data could constitute property under the statute, neither Farrell nor Boerboom allege any facts to demonstrate that Case was responsible for the alleged computer deactivation. Its motion for summary judgment on this counterclaim is therefore granted.

I. Case's Motion for Summary Judgment on the Statutory Nuisance Claims

The statutory nuisance claim advanced by the defendants again relates to the alleged deactivation of the computer systems. The defendants, however, concede that Case was not responsible for that deactivation. Moreover, even if the defendants claimed that Case was responsible, the alleged deactivation is not the type of harm protected by the nuisance statute. *Randall v. Village of Excelsior,* 258 Minn. 81, 84-86, 103 N.W.2d 131, 134-35 (1960) (holding that nuisance should not be extended to cover claims more properly defined by other legal theories).

J. Case's Motion for Summary Judgment on Defendants' Claims of Interception and Disclosure of Wire or Oral Communications

The defendants assert in Count X that Case violated 18 U.S.C. § 2511 by intercepting or attempting to intercept

their wire communications. The facts, however, do not support this claim against Case. Steve Farrell testified that he really did not think that Case intercepted any of Farrell's communications. Similarly, Steve Boerboom indicated that he would say no when asked if Boerboom was contending that Case engaged in some kind of wire-tapping of Boerboom's facilities. Moreover, as previously indicated, § 2511 does not apply to the authorized use of computer data and Case's motion for summary judgment on this claim is granted.

K. Case's Motion for Summary Judgment on Defendants' Claim Regarding Unlawful Access to Electronic Communications

The defendants also seek relief for an alleged violation of 18 U.S.C. § 2701, claiming that Case violated this statute by accessing their computer systems without authorization. The statute, however, bars only unlawful access to stored communications. Boerboom and Farrell consented to access by ADP, and further concede that they have no such claim against Case. Therefore, Case's motion for summary judgment on this claim is granted.

CONCLUSION

Based on the foregoing, the only claims that remain in this action are Boerboom and Farrell's claims for breach of contract and express warranty against ADP. Their damages pursuant to those claims, however, are limited to the recovery of direct damages. Summary judgment is granted on all other claims. Thus, **IT IS HEREBY ORDERED** that:

1. ACTL's motion for summary judgment for the relief requested in its complaint against Jack Farrell Implement Co. and Boerboom International, Inc. is granted in favor of ACTL. Judgment is entered against Boerboom International, Inc. for $20,855.42. Judgment is entered against Jack Farrell Implement Co. for $33,020.46;

2. ACTL's motion for summary judgment on defendan's' answers and counterclaims III-XI is granted in favor of ACTL;

3. ADP's motion for summary judgment on all of defendants' answers and counterclaims is granted in ADP's favor except to the extent that the defendants seek relief for breach of contract and express warranty;

4. Navistar International Transportation Corp.'s (IH) motion for summary judgment is granted in favor of IH on all of defendants' claims against IH Navistar International;

5. J.I. Case Co.'s motion for summary judgment is granted in favor of Case on all of defendants' claims against Case; and

6. Defendants' motion to stay the entry of ACTL's judgments against them is denied.

Dated: April 5, 1991

/s/ David S. Doty
David S. Doty, Judge
United States District Court

United States District Court

DISTRICT OF MINNESOTA

American Computer Trust Leasing	JUDGMENT IN A CIVIL CASE
v.	
Jack Farrell Implement Co.	CASE NUMBER: 4-89 Civil 199

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That plaintiff's motion for summary judgment for the relief requested in its complaint against Jack Farrell Implement Co. is granted in favor of plaintiff and judgment is entered against Jack Farrell Implement Co. for $33,020.46. Plaintiff's motion for summary judgment on defendant's answer and conterclaim III-XI is granted in favor of plaintiff. ADP's motion for summary judgment all of defendants' answer and counterclaim is granted in ADP's favor except to the extent that the defendants seek relief for breach of contract and express warranty. Navistar Int'l Transportation Corp.'s (IH) motion for summary judgment is granted in favor of IH on all of defendants' claims against IH Navistar Int'l. J.I. Case Co.'s motion for summary judgment is granted in favor

of Case on all of defendants' claims against Case; and defendants' motion to stay the entry of plaintiff's judgments against them is denied.

April 5, 1991
Date

FRANCIS E. DOSAL
Clerk

Denise LaFond
(By) Deputy Clerk

United States District Court

DISTRICT OF MINNESOTA

American Computer Trust Leasing	JUDGMENT IN A CIVIL CASE
v.	
Boerboom International, Inc., et al	CASE NUMBER: 4-89 Civil 261

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. ACTL's motion for summary judgment for the relief requested in its complaint against Jack Farrell Implement Co. and Boerboom International, Inc. is granted in favor of ACTL. Judgment is entered against Boerboom International, Inc. for $20,855.42. Judgment is entered against Jack Farrell Implement Co. for $33,020.46; 2. Actl's motion for summary judgment on defendants' answers and counterclaims III-IX is granted in favor of ACTL; 3. ADP's motion for summary judgment on all of defendants' answers and counterclaims is granted in ADP's favor except to the extent that the defendants seek relief for breach of contract and express warranty; 4. Navistar

International Transportation Corp.'s (IH) motion for summary judgment is granted in favor of IH on all of defendants' claims against IH Navistar International; 5. J. I. Case Co.'s motion for summary judgment is granted in favor of Case on all of defendants' claims against Case; and 6. Defendants' motion to stay the entry of ACTL's judgments against them is denied.

April 5, 1991
Date

Francis E. Dosal
Clerk

Julie Rustad
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

American Computer Trust Leasing,

Plaintiff,

v.

Jack Farrell Implement Co., et al.,

Defendants.

Civil No. 4-89-199

ORDER

Civil No. 4-89-261

American Comuter Trust Leasing,

Plaintiff,

v.

Boerboom International, Inc., et al,

Defendants.

Craig D. Diviney, Esq., J. Thomas Vitt, Esq., Margaret M. Zverinova, Esq. and Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, MN 55402, counsel for Plaintiff and Automatic Data Processing, Inc.

James R. Anderson, Esq., P.O. Box 1196, Marshall, MN 56258, counsel for defendants Boerboom and Farrell.

John Q. McShane, Esq., Mary E. Bolcom, Esq., Lezlie Ott Marek, Esq. and Bowman and Brooke,

600 Midwest Plaza Esq., 801 Nicollet Mall, Minneapolis, MN 55402, counsel for Navistar International Transportation Corp.

Bradley G. Clark, Esq. and Oppenheimer, Wolff & Donnelly, First Bank Building, Suite 1700, St. Paul, MN 55101 and Robert A. DuPuy, Esq., John F. Hovel, Esq. and Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202, counsel for J.I. Case Company.

FILED Aug 13, 1991

This matter is before the court on the following motions:

(1) Plaintiff American Computer Trust Leasing's ("ACTL") motion to enter final judgment pursuant to Federal Rule of Civil Procedure 54(b) on ACTL's claims against Boerboom International, Inc. ("Boerboom") and Jack Farrell Implement Company ("Farrell") contained in the court's order of April 5, 1991;

(2) ACTL's motion to increase the amount of those prior judgments against Boerboom and Farrell to reflect interest, costs and attorneys' feels due under the terms of the euqipment lease agreements between the parties;

(3) Motions by Boerboom and Farrell to enter final judgment pursuant to Federal Rule of Civil Procedure 54(b) on the court's order of April 5, 1991; and

(4) Motions by Boerboom and Farrell to stay further proceedings in this matter until all appeals of the April 5, 1991, order have been completed.

Based on a review of the file and record herein, the court:

1. Grants ACTL's motion to enter judgment on its claims against Boerboom and Farrell pursuant to Federal Rule of Civil Procedure 54(b);

2. Grants ACTL's motion for increased interest, costs and attorneys' fees;

3. Grants Boerboom's and Farrell's motion to enter final judgment on various claims purusuant to the order of April 5, 1991; and

4. Grants in part and denies in part Boerboom and Farrell's motion for a stay pending appeal pursuant to Federal Rule of Civil Procedure 62(h).

BACKGROUND

On April 5, 1991, the court granted summary judgment in favor of ACTL on its claims against Boerboom and Farrell, ordering judgment against Boerboom in the amount of $20,855.42, and against Farrell in the amount of $33,020.46. The court further granted summary judgment in favor of ACTL, Automatic Data Processing, Inc. ("ADP"), Navistar International Corp. ("Navistar") and J.I. Case Co. ("Case") on all of Boerboom and Farrell's counterclaims except their claims against ADP for breach of contract and express warranty. Because those claims remain to be tried, the court must apply Federal Rule of Civil Procedure 54(b) to determine if final judgment should be entered on the other claims. Rule 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when

> multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment.

Federal courts apply a two-part analysis to evaluate Rule 54(b) motions. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980). First, the court must satisfy itself that its decision on the relevant claims is a final judgment. *Id.* at 7. In determining what constitutes a final judgment, the Supreme Court stated that the decision "must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is an 'ultimate disposition of an individual claim entered in the course of a multiple claims action.' " *Id.* (quoting *Sears Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

The second step of analysis under rule 54(b) examines whether there is any just reason to delay entry of judgment; federal courts typically consider the equities of the case and the interest of sound judicial administration in making this determination. *Id.* With this standard at hand, the court will examine both motions under Rule 54(b).

1. ACTL's Motion for Entry of Final Judgment Pursuant to Rule 54(b)

The court determines that the April 5, 1991, decision on ACTL's claims pursuant to the equipment lease agreements satisfies the first inquiry under Rule 54(b) because it is the ultimate disposition of ACTL'S claims; nothing

remains to be done with respect to those claims except for entry of judgment and the collection of that judgment by ACTL. Thus, the court's decision constitutes final judgment of ACTL's claims against Boerboom and Farrell.

Second, the court determines that there is no just reason to delay entry of judgment in favor of ACTL. ACTL advanced funds to finance Boerboom and Farrell's acquisition of computer equipment more than six years ago. Boerboom and Farrell have been in default under their equipment lease agreements since September and June of 1987 respectively. The court also finds that entry of final judgment on ACTL's claims is not contrary to the interests of sound judicial administration.[1] ACTL's claims are factually and legally distinct from the claims of Boerboom and Farrell; ACTL's claims only involve the interpretation of the unambiguous terms of its equipment lease agreements. ACTL's only contract with Boerboom and Farrell involves those agreements; ACTL was not involved in the manufacture of the ADP computer equipment, the sales to Boerboom and Farrell, or the service and support on the ADP computer systems. Resolution of

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[1] In considering this factor, courts consider the relationship between the adjudicated and unadjudicated claims, the possibility that the appeal of the judgment will be mooted by future developments in district court, the possibility that the Eighth Circuit will be obliged to consider the issues raised in the appeal for a second time, the existence of claims or counterclaims that could result in a set-off against the judgment, and other miscellaneous factors such as delay and whether certification will shorten the eventual trial. *See In re Flight Transp. Corp. Sec.*, 825 F.2d 1249, 1251 (8th Cir. 1987).

the remaining issues will have no effect on ACTL's claims even if those claims are resolved entirely in favor of Boerboom and Farrell. There is also no possibility that developments in district court will moot any appeal of ACTL's claims and there is no counterclaim against ACTL which could result in a set-off against ACTL's judgments. Because ACTL's claims are completely separate and distinct from those of Boerboom and Farrell, certification of ACTL's claims will not present the Eighth Circuit with the same factual and legal issues in two separate appeals.

Based on the foregoing, the court finds there is no just reason for delay and orders entry of final judgment in favor of ACTL on its claims against Boerboom and Farrell pursuant to Rule 54(b).

2. ACTL's Motion for Interest, Costs and Attorneys' Fees

The order of April 5, 1991, provides that ACTL is entitled to recover $20,855.42 from Boerboom and $33,020.46 from Farrell. Those amounts include interest owed by Boerboom up until January 19, 1989, the date of ACTL's complaint against Boerboom, and interest owed by Farrell up until December 21, 1988, the date of ACTL's complaint against Farrell. ACTL argues that under the terms of the equipment lease agreements, Boerboom and Farrell also owe ACTL eighteen percent interest on the overdue amounts.[2] ACTL thus requests the court to

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[2] ACTL contends that Boerboom owes interest since January 19, 1989, on the principal amount of $19,425.20. ACTL calculated that principal amount by subtracting the interest already included in the $20,855.42 figure in the April 5, 1991 order so that Boerboom would not be charged interest on interest.

increase the judgment against Boerboom by $8,698.32, to reflect interest allegedly due from January 19, 1989, to July 16, 1991, plus $9.58 per day from July 17, 1991 until the date judgment is entered. ACTL seeks interest from Farrell in the amount of $14,460.73, plus $15.43 per day from July 17, 1991 until the date judgment is entered.[3]

ACTL also seeks payment of its costs and attorneys' fees which are to be paid by Boerboom and Farrell under the terms of the equipment lease agreements. ACTL has incurred $3,168.10 in attorney's fees in connection with the prosecution of its claims against Boerboom, and $2,639.65 in fees in connection with its claims against Farrell.[4] ACTL requests that the court add those amounts to its judgments. The court determines that ACTL is entitled to those costs and attorneys' fees pursuant to the terms of its equipment lease agreements and will grant ACTL's motion.

Based on a review of the file and record herein, the court determines that there is no just reason for delay of entry of judgment pursuant to Rule 54(b) in favor of

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[3] ACTL seeks interest since from Farrell on the principal amount of $31,296.44 since January 21, 1988. ACTL subtracted interest included in the April 5, 1991 so as not to calculate interest on interest.

[4] One of the law firms representing ACTL in the present action did not allocate costs and attorneys' fees separately; it seeks an equal amount from Boerboom and Farrell and requests that the court add $2,414.85 to ACTL's judgment against Boerboom and add the same amount to the judgment against Farrell.

ACTL and orders entry of judgment in its favor against Boerboom for $32,721.84, plus $9.58 per day in interest from July 17, 1991 until the date judgment is entered, plus statutory post judgment interest pursuant to 28 U.S.C. § 1961. The court also orders entry of judgment against Farrell for $50,120.84, plus $15.43 in interest from July 17, 1991 until the date judgment is entered, plus statutory post judgment interest pursuant to 28 U.S.C. § 1961.[5]

3. Boerboom and Farrell's Motion for Final Judgment on Its Claims Against ACTL, ADP, Navistar and Case Pursuant to Rule 54(b)

In the order of April 5, 1991, the court granted ACTL's motion for summary judgment on Boerboom and Farrell's answers and counterclaims III through XI. The court also granted Navistar's motion for summary judgment on all of Boerboom and Farrell's claims against it. The court further granted Case's motion for summary judgment on all of Boerboom and Farrell's claims against Case and granted ADP's motion for summary judgment on all of defendants' answers and counterclaims in favor of ADP except to the extent that the defendants sought relief for breach of contract and express warranty claims. Boerboom and Farrell now ask the court to enter final judgment on those rulings under Rule 54(b). Because no claims remain against ACTL, Case or Navistar, the court determines that the April 5, 1991, order is final regarding Boerboom and Farrell's claims against those parties. The

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[5] Those amounts also include ACTL's requested costs and attorneys' fees.

April 5, 1991 also granted summary judgment in favor of ADP on all of Boerboom and Farrell's claims except those involving claims for breach of contract and express warranty. Although claims for breach of contract and express warranty against ADP remain to be tried, the court nonetheless determines that the April 5, 1991, order is final regarding all of the other claims involving ADP.

The court also finds that entry of final judgment on these claims in not contrary to the interests of sound judicial administration. The court granted summary judgment on claims which relate to Boerboom and Farrell's conspiracy theory against ADP, ACTL, Navistar and Case. Those claims are not closely related to the unadjudicated claims for breach of contract and express warranty. As such, they are severable from the breach of contract and express warranty claims. A trial on the outstanding claims will not moot Boerboom and Farrell's appeal of the April 5, 1991, order. The court further finds that the Eighth Circuit will not have to consider two appeals involving the same factual setting. Moreover, the interests of judicial economy will be served by entry of final judgment because of Eighth Circuit affirmance of the April 5, 1991 order will obviate the need for a second trial.

The court further finds that there is no just reason to delay entry of final judgment on these claims. Based on the foregoing, the court grants Boerboom and Farrell's motion for entry of final judgment under Rule 54(b).

4. Boerboom and Farrell's Request For a Stay Pending Appeal

Boerboom and Farrell move for a stay of further proceedings in this matter pending appeal. Under Federal Rule of Civil Procedure 62(h):

> When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment in entered.

Boerboom and Farrell request that the court stay all proceedings in this matter pending their appeal. Apparently, they seek a stay on any proceedings involving the breach of contract and express warranty claims and also a stay of execution of ACTL's judgments pending appeal. The court will grant their stay of execution of judgment pending their posting of a supersedeas bond that meets with the court's approval. The court, however, can see no reason for staying the proceedings involving the contract and express warranty claims based on its determination that those claims are separate from the other claims in this action. Thus, the court will not stay proceedings on those claims pending appeal.

Accordingly, IT IS HEREBY ORDERED that:

1. There is no just reason for delay, thus ACTL's motion for entry of final judgment pursuant to Rule 54(b), and for costs, attorneys' fees and additional interest is granted. Judgment is entered against Boerboom International, Inc. in the amount of $32,990.08, representing the

April 5, 1991 judgment of $20,855.42, plus additional interest in the amount of $8,966.56, plus costs and attorneys' fees in the amount of $3,168.10. Judgment is entered against Jack Farrell Implement Co. in the amount of $50,522.88, representing the April 5, 1991 judgment of $33,020.46, plus additional interest in the amount of $14,892.77, plus costs and attorneys' fees in the amount of $2,639.65.

2. There is no just reason for delay and Boerboom and Farrell's motion for entry of final judgment under Rule 54(b) is granted. Accordingly, final judgment is entered in favor of ACTL on Boerboom and Farrell's answers and counterclaims III-XI; final judgment is entered in favor of ADP on all of Boerboom and Farrell's answers and counterclaims except to the extent that Boerboom and Farrell seek relief for breach of contract and express warranty; final judgment is entered in favor of Navistar on all of Boerboom and Farrell's answers and counterclaims against Navistar; and final judgment is entered in favor of Case on all of Boerboom and Farrell's answers and counterclaims against Case.

4. Boerboom and Farrell's motion for a stay of proceedings is granted in part and denied in part. The court denies any stay of the proceedings involving Boerboom and Farrell's breach of contract and express warranty claims against ADP. Contingent on its approval of a supersedeas bond, the court orders a stay of ACTL's execution of its judgments against Boerboom and Farrell pending appeal.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 13, 1991

/s/ David S. Doty
David S. Doty, Judge
United States District Court

United States District Court

DISTRICT OF MINNESOTA

American Computer Trust Leasing	JUDGMENT IN A CIVIL CASE
v.	
Jack Farrell Implement Co. et al.	CASE NUMBER: Civil 4-89-261

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

ORDER (Judge David S. Doty / 8/13/91)That ACTL's motion for entry of final judgment and for costs, attorneys' fees and additional interest is granted. Judgment is entered against Boerboom Intl., Inc. in the amount of $32,990.08, representing the 4/5/91 judgment of $20,855.42, plus additional interest in the amount of $8,966.56, plus costs and attorneys' fees in the amount of $3,168.10. Judgment is entered against Jack Farrell Implement Co. in the amount of $50,522.88, representing the 4/5/91 judgment of $33,020.46, plus additional interest in the amount of $14,892.77, plus costs and attorneys' fees in the amount of $2,639.65. Boerboom and Farrell's motion for entry of final judgment is granted and judgment is entered in favor of ACTL on Boerboom and Farrell's answers and counterclaims III-XI; judgment is

entered in favor of ADP on all of Boerboom and Farrell's answers and counterclaims except to the extent that Boerboom and Farrell seek relief for breach of contract and express warranty; judgment is entered in favor of Navistar on all of Boerboom and Farrell's answers and counterclaims against Navistar; and judgment is entered in favor of Case on all of Boerboom and Farrel's[sic] answers and counterclaims against Case. Boerboom and Farrell's motion for stay of proceedings is granted in part and denied in part. The Court denies any stay of the proceedings involving Boerboom and Farrell's breach of contract and express warrant claims against ADP. Contingent on its approval of a spuersedeas bond, the Court orders a stay of ACTL's execution of its judgments against Boerboom and Farrell pending appeal

August 13, 1991
Date

Francis E. Dosal
Clerk

Gloria M. Barkosky
(By) Deputy Clerk Gloria M. Barkosky

United States District Court

DISTRICT OF MINNESOTA

American Computer Trust Leasing	JUDGMENT IN A CIVIL CASE
v.	
Jack Farrell Implement, et al	CASE NUMBER: 4-89 Civil 199

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has a rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That ACTL's motion for entry of final judgment and for costs, attorneys' fees and additional interest is granted. Judgment is entered against Boerboom Int'l, Inc. in the amount of $32,990.08, representing the 4/5/91 judgment of $20,855.42, plus additional interest in the amount of $8,966.56, plus costs and attorneys' fees in the amount of $3,168.10. Judgment is entered against Jack Farrell Implement Co. in the amount of $50,522.88, representing the 4/5/91 judgment of $33,020.46, plus additional interest in the amount of $14,892.77, plus costs and attorneys' fees in the amount of $2,639.65. Boerboom and Farrell's motion for entry of final judgment is granted. Judgment is entered in favor of ACTL on Boerboom and Farrell's answers and counterclaims III-XI; judgment is entered in

favor of ADP on all of Boerboom and Farrell's answers and counterclaims except to the extent that Boerboom and Farrell seek relief for breach of contract and express warranty; judgment is entered in favor of Navistar on all of Boerboom and Farrell's answers and counterclaims against Navistar; and judgment is entered in favor of Case on all of Boerboom and Farrell's answers and counterclaims against Case. Boerboom and Farrell's motion for stay of proceedings is granted in part and denied in part. contingent on its approval of a supersedeas bond, the court orders a stay of ACTL's execution of its judgment against Boerboom and Farrell pending appeal.

August 13, 1991
Date

FRANCIS E. DOSAL
Clerk

Denise LaFond
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3064

American Computer Trust Leasing, Appellee, v. Boerboom International, Inc., Appellant, v. ADP; Automatic Data Processing Dealers Services, Inc.; Automatic Data Processing, Inc.; International Harvester Co., also known as Navistar International Corporation; J. I. Case Co., a wholly owned subsidiary of Tenneco; John Doe; Richard Roe, Appellees.	*	Appeal from the United States District Court for the District of Minnesota.
American Computer Trust Leasing, Appellee, v. Jack Farrell Implement Co., Appellant,	*	

v. *

ADP; Automatic Data Processing Dealers Services Inc.; Automatic Data Processing, Inc.; International Harvester Co., also known as Navistar International Corporation; J. I. Case Co., a wholly owned subsidiary of Tenneco; John Doe; Richard Roe, *

Appellees. *

Submitted: May 13, 1992

Filed: June 23, 1992

Before BEAM, Circuit Judge, HENLEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

HENLEY, Senior Circuit Judge.

Appellants Jack Farrell Implement ("Farrell") and Boerboom International, Inc. ("Boerboom") appeal from an order of the district court[1] entering summary judgment in favor of appellees American Computer Trust Leasing ("ACTL"), Automatic Data Processing, Inc. ("ADP"), Navistar International Corporation (formerly International Harvester Co.) ("IH"), and J. I. Case Co. ("Case"). ACTL brought suit against appellants to collect unpaid lease payments. Appellants filed a counterclaim

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[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

against ACTL and third-party claims against ADP, IH, and Case. These counterclaims and third-party claims alleged fraud, breach of contract, breach of warranty, RICO violations, conspiracy, deceptive trade practices, and other charges. In a carefully written and detailed opinion, the district court granted summary judgment in favor of appellees on all the appellants' counterclaims and third-party claims, except appellants' claim against ADP for breach of contract and express warranty. *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991). We affirm and remand the case for the court to proceed on the appellants' remaining claims.

I.

Appellants were long-time farm implement dealers for IH until 1985 when Case purchased some of IH's agricultural equipment operations. After Case's acquisition of IH, both appellants became (and still are) authorized Case farm implement dealers. This case involves the computer equipment and software that a dealer uses to communicate with the manufacturer it represents. We recite the facts in the light most favorable to appellants.

In the 1970s, IH began providing computer services to its dealers to increase efficiency. In general, the computer system helped dealers maintain their large parts inventory and customer lists and enabled them to communicate (*i.e.* share data, place orders, check availability of parts, etc.) with the main office via telephone lines. Under the original IH system, dealers paid IH a monthly fee for the computer services. In the early 1980s, IH began

experiencing severe financial difficulties and, in an effort to cut costs, decided to stop providing these computer services. IH elected to abandon its existing computer network and replace it with an "out-source" method of computer networking.

Under this new system, each dealer would be responsible to purchase or lease a computer system and software that would communicate with IH's headquarters. In 1983, IH contracted with ADP to design special software for IH and to provide compatible hardware to any dealer who wished to purchase it. Although IH recommended that its dealers purchase their equipment and software from ADP, it did not require its dealers to purchase ADP computers. After the sale of IH to Case, Case entered into a similar agreement with ADP. Both of the ADP agreements (with IH and Case) contain a provision that ADP will pay IH or Case a "royalty" for each computer that a dealer buys. IH claims it bargained for the royalties as consideration for the expertise it developed in computer network systems and for its assistance in marketing the ADP system.

Both appellants eventually leased computers from ACTL and entered computer maintenance and software licensing agreements with ADP. Shortly thereafter appellants began to experience great difficulties with their systems. The record indicates that a large percentage of IH and Case dealers also had problems with the ADP computers.

When appellants refused to make their lease payments, ACTL brought suit in state court to collect. Appellants made numerous counterclaims and third-party

claims, and the suit was removed to federal court. On appeal, appellants argue the district court erred in granting summary judgment on their claims of fraud, RICO violations, conspiracy, and deceptive trade practices.

II.

In reviewing a grant of summary judgment, we apply the same standard as the district court, view the evidence in the light most favorable to the nonmoving party, and give the nonmoving party the benefit of all reasonable inferences to be drawn from the evidence. *Moore v. Webster*, 932 F.2d 1229, 1230-31 (8th Cir. 1991). The issue before us is whether "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party has demonstrated an absence of evidence to support the nonmoving party's case, the nonmoving party must establish that there is legally sufficient and significantly probative evidence to present to the trier of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Appellants contend that issues of material fact exist regarding all of their claims. Based on our review of the record, we disagree and affirm the entry of summary judgment against appellants.

Although appellants make several claims against appellees based on different legal theories, this is essentially a fraud case. To prevail on their fraud claim under Minnesota law, appellants must show appellees either made false representations, *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986), or failed to disclose a material fact in certain circumstances, *L & H Airco, Inc. v.*

Rapistan, Corp., 446 N.W.2d 372, 380 (Minn. 1989). Appellants claim appellees committed fraud in both ways.

With respect to their claim of fraudulent nondisclosure, appellants contend it was fraud for appellees not to disclose the royalty agreements between ADP and IH/Case.[2] A party does not commit fraud by failing to disclose facts except in certain special circumstances such as: when a confidential or fiduciary relationship exists; when disclosure is necessary to clarify misleading information already disclosed; or, when one party has "special knowledge" of material facts to which the other party does not have access. *L & H Airco*, 446 N.W.2d at 380. (citations omitted). Appellants have failed to establish the existence any of these special circumstances and therefore appellees were not under a duty to disclose the terms of the royalty agreements.

Appellants negotiated with ADP and ACTL concerning this computer equipment and eventually leased computers from ACTL. They also entered into computer maintenance and software licensing agreements with ADP. Because these were ordinary business transactions conducted at arm's length, neither ADP or ACTL was under a fiduciary duty to disclose the terms of the royalty agreement. *See Minnesota Timber Producers Ass'n. Inc. v. American Mut. Ins. Co.*, 766 F.2d 1261, 1267-68 (8th Cir. 1985) (applying Minnesota law), *cert. denied*, 474 U.S. 1059 (1986). Likewise, appellants have failed to show that a

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[2] Appellees claim the royalty agreement was disclosed to the IH Dealer Council. For purposes of this discussion, we assume, as appellants contend, that the royalty agreement was not disclosed.

duty arose due to ADP's or ACTL's misleading statements or "special knowledge."

Appellants have also failed to show IH and Case were under a duty to disclose. Appellants conducted their own independent investigations of the competing computer systems and did not rely exclusively on the endorsements of either IH or Case. Appellants argue that there existing dealer-manufacturer relationships with IH and later Case, combined with IH's and Case's endorsement of ADP, created a situation in which IH and Case had a duty to disclose the royalty agreement. This evidence fails to create a duty to disclose on the part of IH or Case. *See W.K.T. Distrib. Co. v. Sharp Elect.*, 746 F.2d 1333, 1336-67 (8th Cir. 1984) (under Minnesota law, ordinary supplier-distributor relationship is not fiduciary in nature).

With respect to the claim of fraudulent representations, appellants list eleven statements that allegedly constitute fraud. More precisely, appellants contend these statements create a genuine issue of material fact for trial. To prevail on a claim of fraud by misrepresentation, appellants must show: (1) a false representation of a material fact; (2) made with knowledge of the falsity or made without knowing whether the statement was true or false; (3) made with the intention to induce appellants to act in reliance on the statement; (4) that the representation caused appellants to act in reliance; and (5) pecuniary damage as a result of the reliance. *Financial Timing Publications v. Compugraphic Corp.*, 893 F.2d 936, 942-43 (8th Cir. 1990) (quoting *Specialized Tours*, 392 N.W.2d at 532). None of the statements identified by appellants preclude summary judgment in this case. We pause to

discuss three representations which have been emphasized by appellants.

The first involves alleged concealment of the royalty agreement and is closely related to appellants' nondisclosure claim. In an affidavit submitted in response to appellees' motion for summary judgment, it is stated that "Steve Boerboom [the principal of appellant Boerboom] specifically recalls asking the IH representative assigned to communicate the Boerboom, probably W. S. Orrell . . . , 'What's in this for IH?', to which the IH employee responded, 'Nothing.' " This statement, of course, does not preclude summary judgment against appellant Farrell because there is no evidence Farrell ever knew the statement was made. Nor does this statement preclude summary judgment against Boerboom.

Steve Boerboom claims that he and Orrell discussed the ADP system at the time Boerboom was deciding which computer to buy. In his deposition, Steve Boerboom indicated that he felt "coerced" by Orrell's statements such as, "[T]his is the system that [IH is] backing," and "This is the one they looked into." Steve Boerboom also stated that Orrell "took us out for supper" after "signing up" to purchase the ADP system. We assume that Orrell's response to Steve Boerboom's question, "What's in this for IH," took place in this same time period.

In *Florenzano v. Olson*, 387 N.W.2d 168, 172-73 (Minn. 1986), the Supreme Court of Minnesota discussed the difficult distinction between negligent misrepresentations and fraudulent misrepresentations. The court stated, "Under neither theory, however, is one held to warrant

the truth of all statements made. A good faith, non-negligent mistake is not the basis of liability for misrepresentation in this state." *Id.* at 173. Based on the record before us, the statement by Orrell represents at most a good faith mistake on the part of IH. There is nothing to indicate that Orrell knew or should have known about the royalty agreement and it does not appear that Orrell was one of the IH employees responsible for demonstrating the ADP system or answering questions about the system. For Orrell's response to be a negligent misrepresentation, Boerboom must show that Orrell "ha[d] not discovered or communicated certain information that the ordinary person in his or her position would have discovered or communicated." *Id.* at 174. Because Boerboom failed to show any such evidence, this statement does not preclude summary judgment.

The second allegedly false statement we address was made by ADP concerning the security of the computer systems. Documents distributed by ADP stated that no one could enter the computer system without the dealer's authorization. In fact, ADP could, and did, enter the systems and "deactivated" the software after appellants defaulted on their agreements.[3] Appellants entered into

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[3] There is some question as to whether ADP "deactivated" appellant Boerboom's system. For purposes of this discussion, we assume, as Boerboom contends, that its system was deactivated. We note in passing that in some circumstances issues of "software deactivation" and "software repossession" may pose legal problems. The issue we address in this appeal, however, is whether the statements regarding computer security are fraudulent under Minnesota law. Appellants do not challenge the district court's dismissal of their claims for wrongful software deactivation.

software licensing agreements with ADP which expressly provided that the software was the property of ADP, and that the software license would be cancelled upon default. The record indicates appellants knew that ADP had access to their computer systems to service the software. Because ADP's statements regarding security did not indicate that a dealer could prevent ADP from entering the system, the statements were not false and do not constitute fraud.

The third allegedly false representation we discuss is attributed to IH and Case. Appellants argue IH and Case falsely stated that they did "extensive research" before endorsing ADP. Appellants claim no testing of the system was done before the endorsement and the endorsement was given in exchange for the royalty arrangement. The record indicates that IH sought proposals from eleven different computer companies, narrowed the field down to three, and finally selected ADP. ADP was selected because it was a large and financially stable company with experience in the design of this type of computer network. Appellants contend one document in particular shows that IH did not know whether the ADP system worked at the time it endorsed ADP.[4] IH, however, could

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[4] At oral argument, appellants' counsel referred to this as the document that "tells the story of the whole case." The document indicates that at a meeting between IH and ADP in December 1983, while discussing the endorsement of ADP in Canada, and IH representative stated that the IH-ADP contract for the United States was signed prior to knowing whether the ADP system worked.

not have known whether the ADP system worked when it entered into the contract with ADP because the ADP system had not yet been developed. That was the purpose of the IH-ADP contract – for ADP and IH to work together to develop a computer system. In sum, IH's or Case's statements about the amount of research they conducted prior to endorsing ADP were not false and do not constitute fraud.

With respect to the remaining representations that appellants identify as fraudulent, we agree with the district court that none of the statements constitute actionable fraud. The statements complained of concern future acts or opinions and, as such, are not fraudulent. *See, e.g., Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202 (Minn. 1990) (representations of future acts), *rev'd on other grounds*, ___ U.S. ___, 111 S. Ct. 2513 (1991); *Mutsch v. Rigi*, 430 N.W.2d 201, 204 (Minn. Ct. App. 1988) (statements of opinion).

In addition to their allegations of fraud, appellants also claim appellees violated RICO, 18 U.S.C. § 1962 (1988), by engaging in a pattern of racketeering activity. As a basis for this claim, appellants allege appellees committed mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343 (1988). As discussed above, appellants have failed to establish any actionable fraud and therefore summary judgment on their RICO claims was proper.

Although we do not discuss in detail appellants' claims regarding conspiracy and deceptive trade practices, we note that these claims are largely dependent upon the allegations of fraud and therefore are without merit.

III.

We affirm the district court's order in all respects and remand for the district court to consider appellants' remaining claims.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3064MNMI

American Computer Trust Leasing, Appellee, vs. Boerboom International, Inc., Appellant, vs. ADP; et al., Appellees,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
American Computer Trust Leasing, Appellee, vs. Jack Farrell Implement Co., Appellant, vs. ADP, et al., Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

Judge Magill took no part in the consideration or decision of this case.

July 31, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

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Automatic Data Processing
Dealer Services Division
920 E. Algonquin Road
Chicago, Illinois 60195
312-397-1700 ADP

Important news about IH and ADP . . . Read on . . .

Dear International Harvester Dealer:

ADP Dealer Services is proud to have been selected by International Harvester to develop and provide data processing equipment and services to its dealer body.

We're proud of the existing ADP product line and our success in becoming the largest independent computing company in your marketplace. No other computing company serves as many farm and implement and heavy truck dealers as does ADP.

International Harvester's concern for you resulted in extensive research. By selecting ADP they have succeeded in assuring that you will be offered state-of-the-art, real time computing systems.

We have agreed by contract to make specific enhancements to our interactive application offerings so that your dealership – be it Ag or Truck can be sure that the new IH family of products is the best. The best because ADP has customized them to your IH dealership needs.

The enclosed information outlines some specific application software features plus a wide range of computer hardware in the new IH family of products.

The new system will offer a full line of Personal, Micro, Mini and Macro computing systems. International Harvester and ADP believe this family of products is the best in the business and that it offers each of you, large or small, a reliable, cost-effective data processing solution.

In order to best manage your phase-over to the new system, International Harvester and ADP have agreed to a marketing process we call a *"Rollout"*. At Rollout meetings to be held in your area, full system presentations and demonstrations will be made by both IH and ADP personnel.

Because of the vast numbers of dealers involved and International Harvester's strong desire to accomplish conversions in an orderly manner, the Rollouts will probably cover a two-year period.

We realize some of you involved in later Rollouts may require a systems change sooner, even now. Provisions have been made to answer your needs. Simply contact the IH Steering Committee through your District Manager, or return the enclosed reply card today.

International Harvester has ensured that you will get the finest dealership computing system, best training and service – yes, your best data processing value – through ADP via the new IH family of products. We'll keep you informed as we progress. More specific product details

and individual Rollout meeting dates will be forthcoming.

Sincerely,

/s/ Ted Valenti
Ted Valenti
Vice President

TV/md

Appeals Court Appendix 00822

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Excerpt Page 3 of December 6, 1983,
ADP/IH Meeting Minutes

* * *

Mr. Suberlak stated the contact has not been written because it is not known what the Canadian requirements were regarding the system and associated communications. He said ADP would feel more comfortable writing a contract once they know the system works and is acceptable. Mr. Minter stated that IH does not agree with Mr. Suberlak's position, since the US Contract was signed prior to knowing whether or not the system worked. [Bold emphasis added; underline not added]

Mr. Waller suggested that a CANADIAN DCN Pilot Dealer be established to test communications. Mr. Nordeman indicated that the DCS testing for the US should be completed prior to addressing Canada. Mr. Nordeman also stated that both IH and ADP had previously agreed there would be no technical communications

differences between Canada and the US and that Racal-Vadic had obtained Canadian certification of the modem presently approved by IH for use with the ADP system.

Mr. Bainter indicated that ADP felt Racal-Vadic did not have Canadian certification for the PROTOTYPE Modem. Since Mr. Bainter's statement referred to the Triple Modem, which, at this time, is not approved by IH, no further discussion occurred regarding Mr. Bainter's observation.

Mr. Valenti felt a joint IH/ADP communique should be released to Canadian Dealers. This will be addressed.

Mr. Suberlak will begin to draft the Canadian Contract and forward to Mr. Hewitt (IH-Legal) not later than January 1, 1984. He is not optimistic the contract will be signed by January 1, 1984.

It was generally agreed to that Messrs. Suberlak and Hewitt must meet to resolve the Canadian Contract expeditiously.

4. R & D Status:

Mr. Minter stated the testing of Version II DCS software had not begun due to missing files, programs etc. He further stated IH did not receive a complete Version II package as indicated in Mr. Bainter's letter of November 29, 1983 and that both the ADP hardware and software must reach a level which provides an optimum testing environment.

* * *

Appeals Court Appendix
00920

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LOGO

INTERNATIONAL HARVESTER

April 27, 1984

Mr. T. D. Valenti
Division Vice-President
Automatic Data Processing
Dealers Services, Inc.
920 E. Algonquin Rd.
Schaumburg, IL 60195

Re: IH DCN Information Data Flow

Dear Ted:

I have enclosed two (2) lists containing poll schedule of IH DCN Dealers for your use.

As you can see, one list is for Stock Orders and Retail Tracking, while the other list covers Financial. Contained in these listings are the following:

Financial:	DealCor Dealers polled 5th work day of each month.
	All other dealers polled 12th work day each month.
Retail Tracking:	All dealers polled the 1st work day each month.
Weekly Stock Orders:	Day for dealer polling is identified by the Alpha Codes A-E (Monday through Friday).

Confirming information given IH during our meeting of April 25, 1984, IH Dealers have not received classroom training on the ADP DCS software that provides for Weekly Stock Orders, Financial and Retail Tracking, nor are they being trained by field AE.

Ted, we expect to receive at 90% of all dealers, first time polling, the night of May 1, 1984, with the balance coming in the next day, depending on problems experienced.

IH is as concerned as ADP, if not more so, to install as many dealers to INTRNET and IH DCN as soon as possible; however, we cannot allow the present conditions in IH Dealerships to continue. Please do not force us to stop conversions because ADP cannot, or will not, take seriously the DCS applications required by IH.

Appeals Court Appendix
01232

We are expecting ADP to take whatever action is necessary to provide all dealers the necessary training assistance, hardware equipment and complete installs in order that the above 90% success rate is obtained. [Bold emphasis added]

IH will not provide any May conversions if the above does not occur. Please do not force this.

Sincerely,

/s/ S. W. Minter
S. W. Minter
Manager, Dealer Systems Services
pmh
Atachs.

cc: J.W. Bowyer-CCCI
B.L. Mercer-WH-Truck
W.E. Hewitt-WH-Legal
J.B. Schenck-AEG/GMO
W.J. Fessler-AEG/GMO
B.J. Clyde-WH-Truck
Appeals Court Appendix
01233

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LOGO

INTERNATIONAL HARVESTER

August 31, 1984

Mr. T.D. Valenti
Division Vice President
Automatic Data Processing
Dealer Services Inc.
920 E. Algonquin Road
Schaumburg, Il. 60195

Dear Ted:

Attached is a request previously forwarded to B.P. Thompson on two occasions. On July 16, 1984 I wrote to you regarding the same request.

Needless to say, I have not been given the courtesy of a reply.

At this point, this will be my last request for the information. Your lack of response appears to indicate a low priority of concern for and approach toward the IH Agricultural Dealer, Agricultural Group and for that matter the project itself.

If this was the first occurrance of a lack of responsiveness, it would be understandable. However, this has

been the rule rather than the exception and seriously impairs our mutual efforts to effectively manage, respond and evaluate current activity as well as future strategies. [Bold emphasis added]

I trust, at least I hope; you are concerned enough to respond to our requests. If not please advise with whom I may communicate regarding our combined efforts to successfully attain our mutual goals.

Respectfully,

/s/ C.G. Thompson
C.G. Thompson
Chairman, IH Steering Committee

vec
cc: S.W. Minter -- OB-3
W.J. Fessler – AEG/GO
R.L. Hale – AEG/GO

Appeals Court Appendix
01201

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LOGO

INTERNATIONAL HARVESTER

Ted: Does it ever stop; this tells them anything to get the sale. The hardest simple thing to accomplish in this project has been to establish and maintain a good ADP reputation.

Wayne
11/30/84
done
[3 initials]

[Bold emphasis added]

November 30, 1984

Mr. T. D. Valenti
Automatic Data Processing
Dealer Services
920 East Algonquin Road
Schaumburg, Illinois 60195

Dear Ted:

Attached is a letter recently received in our office from G. R. Turner, of the Suffolk Equipment Company.

In reading Mr. Turner's letter it is obvious the credibility of ADP with this dealer is marginal at best. Mr. Turner also states certain commitments and assurances were given by ADP at the time the deal was originally consummated. [sic]

Please provide the undersigned a written explanation as to why ADP did not meet the dealer's expectations regarding the installation of the system he purchased. A copy of your correspondence should also be directed to Mr. Turner.

I would suggest you respond expeditiously so that any further deterioration in your relationship with Suffolk Equipment Company can be avoided.

Respectfully,

/s/ C. G. Thompson
C. G. Thompson
Chairman, IH Steering Committee

msh

cc: S. W. Minter OB3
G. R. Turner – Suffolk Equipment Company
IH Steering Committee

Appeals Court Appendix
01216

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CASE

Date 5 September 1986
From Mark Huenemann
Location Mktg Svcs/Elmwood

To V Rickey Subject ADP Status

Here is the current status on ADP communications development:

1. We met with them on 21 August, expecting the detailed explanation of their technical and financial plans for SNA communications promised us by 1 August (which we had insisted we have prior to the AG Dealer Council next week). We were looking forward to finally getting the information we have been after for over 18 months.

Rather than delivering what was promised, ADP brought in some new players and (1) said some very impressive things about their new attention to Case and our now being their number one priority, then (2) presented to us the same idea for communications we turned down several times in early 1985 (their proposal would have all ADP dealers sending data to a computer in Detroit which

would convert to SNA and resend to Racine). We prepared a detailed list of our concerns re this method and scheduled another meeting to discuss each issue.

2. We met again 4 September to look at other alternatives and prepare for the detailed technical meeting schedule for 5 September. ADP showed us four alternatives they analyzed, with total first year costs ranging from $1.5 to over $2.3 million (partial copy of their handout attached). Because ADP did not schedule the needed technical people for the 5 September session, we cancelled it. It is now tentatively rescheduled for 11 September.

3. I agreed with Dave Spurlock that our systems and data processing people should as quickly as possible look at the feasibility and cost to develop PC-based communications for ADP dealers without ADP. We will look at the pros and cons of this as an alternative if we continue to find ADP's statements of partnership and cooperation are not supported by their actions.

4. We plan to continue to work with ADP as well as possible (primarily out of concern for the approximately 325 Case/Case IH dealers with ADP systems) and strive for a practical solution. Although SNA development for ADP systems is not easy (one of their own vice presidents described their package as "the worst communications box in the world"), we remain convinced their effort to this point has been minimal and self serving. Some of their new management put in place by Ron

Zazzara seems to have a more cooperative attitude, but I am waiting to see results. [Bold emphasis added]

/s/ Illegible
xc: R Krummel
D Spurlock

Appeals Court Appendix
00846-00847

Supreme Court, U.S.
FILED
OCT 15 1992
OFFICE OF THE CLERK

(2)

NO. 92-527

In The
Supreme Court of the United States
October Term, 1992

Boerboom International, Inc.
and Jack Farrell Implement Co.,

Petitioners,

v.

American Computer Trust Leasing; ADP; Automatic Data Processing Dealers Services, Inc.; Automatic Data Processing, Inc.; International Harvester Co., also known as Navistar International Corporation; J. I. Case Co., a wholly owned subsidiary of Tenneco; John Doe; Richard Roe,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION

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COUNSEL FOR RESPONDENT NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

BEST AVAILABLE COPY

REASONS FOR DENYING WRIT

Respondents J. I. Case Company[1] and Navistar International Transportation Corp. respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's Opinion in this case (reported at 967 F.2d 1208 (8th Cir. 1992)) for the following reasons:

1. The Petition presents no important, unsettled question of federal law. Supreme Court Rule 10.

2. The Petition presents no question of federal law which has been decided by the Eighth Circuit in conflict with any decision of this Court, of another United States Court of Appeals, or of any state court of last resort. Supreme Court Rule 10.

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1. Pursuant to Supreme Court Rule 29, J. I. Case Company states that it is a subsidiary of Tenneco, Inc. Contrary to Petitioners' assertion at p. ii of their Petition, Tenneco is not itself a third-party defendant in this matter.

Petitioners stretch to manufacture a conflict between the Eighth Circuit and two other federal courts of appeals in this matter. Petitioners argue that the Eighth Circuit has held "secret kickbacks" to constitute "ordinary business transactions" in purported contrast to the Sixth and Seventh Circuits, which have held such "kickbacks" to constitute "mail and wire fraud." Petition, p. 6.

Actually, Petitioners miscite the Eighth Circuit's Opinion (967 F.2d at 1212). The Court there merely found that, when Petitioners negotiated computer leases and licensing agreements with Respondents Automatic Data Processing and American Computer Trust Leasing in this matter, these were "ordinary business transactions" under Minnesota state law, giving rise to no special fiduciary duties owing to Petitioners. This finding

in no way presents a federal law conflict question.

CONCLUSION

For these reasons, Respondents J. I. Case Company and Navistar International Transportation Corp. respectfully request that the Petition for Writ of Certiorari be denied.

Dated: October 15, 1992.

Respectfully submitted,

Robert Alan Dupuy
(Counsel of Record)
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